FILED
981282 FEB 10 1999
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No. 98-

In the Supreme Court of the United States

OCTOBER TERM, 1998

FRANKS & SON, INC., on behalf of themselves and all others similarly situated

Petitioners,

v.

THE STATE OF WASHINGTON, WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, AND OFFICE OF THE STATE TREASURER

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Commerce Clause requirement that state taxes be fairly apportioned is inapplicable to "regulatory fees," *i.e.*, state exactions that are used to pay for regulatory activity.

RULE 29.6 STATEMENT

Petitioner Franks & Son, Inc., has no parent corporation and no nonwholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Franks & Son, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Washington Supreme Court in this case.

OPINIONS BELOW

The opinion of the Washington Supreme Court (App. *infra*, 1a-31a) is reported at 136 Wash. 737, 966 P.2d 1232. The opinions of the trial court (App., *infra*, 32a-58a) are unreported.

JURISDICTION

The judgment of the Washington Supreme Court was entered on November 12, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause of the United States Constitution provides in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States.

STATEMENT

The decision below injects an illogical and dangerous loophole into the limitations imposed by the Commerce Clause upon state taxing authority. This Court has held that state taxes on interstate commerce must be fairly apportioned among taxing jurisdictions, thus ensuring that no State "take[s] more than its fair share of taxes from [an] interstate transaction." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). But the Washington Supreme Court held in this case that the apportionment requirement does *not* apply so long as the revenues collected under a given tax are used to pay the costs associated with state regulatory activity. That decision plainly departs from this Court's holdings, permits the imposition of cumulative

burdens on interstate commerce, contributes to a growing disarray in the lower courts, and sows considerable confusion in an already complex area of the law. Further review therefore is warranted.

1. At the time of the events giving rise to this action, the State of Washington imposed a flat annual fee (the "Washington tax"[1]) on trucks that traveled the State's highways. Washington Laws of 1971, 1st Ex. Sess., ch. 143, § 5, previously codified at RCW 81.80.320. The Washington tax required payment of a flat fee by every truck that entered the State, in amounts that varied according to the weight of the truck but not the miles driven on Washington highways; the tax ranged from $7 for vehicles weighing less than 4,000 pounds to $48 dollars for trucks weighing 72,000 pounds or more. See App., *infra*, 2a.[2] The tax regime made it unlawful for any carrier to operate a vehicle in Washington without payment of the fee. See *id.* at 3a. The revenue from the tax was used to fund the State's "motor carrier safety enforcement program" (*ibid.*), paying for what the court below described as "safety programs and inspections related to trucks on Washington's roads." *Id.* at 18a.

Petitioner brought this suit in Washington state court as a class action on behalf of all interstate motor carriers whose vehicles travel in and through Washington, contending that

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[1] We variously refer to the Washington levy as a "tax" or a "fee" because, for reasons explained below, we do not regard the nomenclature as bearing on its constitutionality.

[2] As an alternative to the flat tax, the Washington regime allowed carriers to purchase "single trip permits"; it also provided for "floater cards," which carriers could transfer among vehicles as they were sent into the State. App., *infra*, 3a-4a (citing former RCW 81.80.300; RCW 81.80.318). In addition, all vehicles were required to pay a federally authorized "identification fee" that never exceeded $10. *Ibid.*

the Washington tax is inconsistent with the Commerce Clause of the United States Constitution. See App., *infra*, 4a.[3] Petitioner contended that the Washington tax discriminated against interstate commerce and was invalid under the doctrine of cases like *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987), which held that flat taxes on trucks traveling interstate do not satisfy the Commerce Clause requirement of fair tax apportionment; the State responded that *Scheiner* was inapplicable because the Washington levy was a "regulatory fee" and not a "tax."

The trial court agreed with petitioner that the Washington tax was unconstitutional. In its view, "any regulation involving imposition of a tax-like fee is subject to the same scrutiny under the Commerce Clause as taxes are." App., *infra*, 51-52a. The court explained: "[t]he regulatory fee is exacted for the privilege of entering and using highways in Washington, much like fees charged users for highway maintenance in *American Trucking Assn. v. Scheiner*, *supra*. * * * [T]he safety inspection program should not be analyzed differently because it arises from the state's police power rather than the state's taxing authority." *Id.* at 42a-43a. The court added that "[a]ll states could duplicate this fee on interstate carriers because the safety issues within their boundaries are similarly implicated. Accordingly, there is a potential for multiple burdens [on interstate trucks]." *Id.* at 43a.[4] Nevertheless, although holding the tax unconstitutional,

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[3] Although the tax was repealed effective January 1, 1994, the suit continued because petitioner sought refunds of fees paid since March 1987. App., *infra*, 7a.

[4] Having held that the tax was not properly apportioned, the court never decided whether the levy also discriminated impermissibly against interstate commerce. Even assuming that interstate carriers effectively paid more per-mile than did intrastate carriers under the flat tax, the court noted the State's contention that interstate carriers impose burdens on the State that differ from those imposed by

the court denied refund relief by giving its decision purely prospective effect. *Id.* at 32a-39a.

2. After both parties appealed (the State challenging the finding of unconstitutionality and petitioners contesting the denial of a refund), the Washington Supreme Court reversed the trial court's ruling on the merits of the Commerce Clause issue, holding the Washington tax constitutional. App., *infra*, 1a-31a. The state supreme court acknowledged that "[i]f the regulatory fee were a tax, * * *, then the question in this case would be whether the tax was properly apportioned." *Id.* at 13a. But the court declined to ask (let alone answer) that question, accepting the State's argument that "a *regulatory fee* is different from a *tax*." *Id.* at 10a (emphasis in original). The court explained that a fee must be regarded as "regulatory" if the revenues it raises "are used exclusively for purposes of financing regulation" (*id.* at 11a), reasoning that regulatory fees are subject to lesser scrutiny than are general revenue taxes because "[t]he burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations." *Id.* at 11a (citations and internal quotation marks omitted). The court therefore concluded that a "regulatory fee [is] not a tax subject to the apportionment requirement" (*id.* at 15a) and that "the stringent standard for appraising tax measures does not apply where the statute at issue qualifies as a regulatory measure." *Id.* at 16a.

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intrastate carriers. The court found that, at the summary judgment stage, "[t]hese factual claims [were] not refuted by Plaintiffs." App., *infra*, 42a. The court therefore concluded that "Plaintiffs' concerns for disparity of costs per mile to interstate and intrastate carriers does not mean that this regulatory fee discriminates against interstate commerce." *Ibid.* Because the court granted petitioner summary judgment on apportionment grounds, there was no need for it to revisit the question of discrimination.

Turning specifically to the Washington tax at issue, the court opined that "[w]hether an exaction is a tax or a fee depends on whether its purpose is to raise revenue or to regulate an industry or services." App., *infra*, 12a. To make this determination, the court applied a three-part state-law test that inquired "whether the primary purpose of the monetary assessment is to accomplish desired public benefits which cost money, or to regulate an industry or activity" (*ibid.*); "whether the money collected must be allocated only to the authorized regulatory purpose" (*ibid.*); and "whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer." *Id.* at 13a. Under this test, the court held that the Washington levy "imposed a regulatory fee, not a flat tax." *Ibid.* The court therefore turned to the balancing test announced in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), to determine the constitutionality of state *regulations* under the Commerce Clause, and concluded that the Washington tax passed this test. App., *infra*, 16a-20a.[5]

Justices Sanders and Alexander dissented. App., *infra*, 24a-31a. Finding that the Washington tax "cannot be distinguished from the one held unconstitutional in *Scheiner*" (*id.* at 30a), Justice Sanders explained that "[w]hether we characterize this charge as a 'tax' or a 'regulatory fee' doesn't matter in and of itself — only whether its measure places a heavier burden on interstate than intrastate activities, *Scheiner*, 483 U.S. at 281-82, thus granting a competitive advantage to local truckers at the expense of their interstate competitors." *Id.* at 24a. He therefore "disagree[d] with the majority that a regulatory fee on the privilege to use the roads of a state need not be apportioned to survive constitutional

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[5] The court also rejected petitioners' contention that the Washington tax was preempted by federal law. App., *infra*, 20a - 23a. That issue is not presented here.

scrutiny, at least when that fee is not based on the consumption of state resources by the actual payer of the fee." *Id.* at 27a. Noting that the collection of flat fees by all the States would lead to the imposition of multiple taxes on interstate vehicles but only a single tax on intrastate carriers, he concluded that "[s]uch result discriminatorily burdens interstate commerce whether we call it a regulatory fee, a tax, or some other name" — and that "[t]his conclusion necessarily holds true no matter how each of the states spends the resulting revenue." *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

This case presents a recurring issue of great practical importance: whether States may evade the basic Commerce Clause requirement of fair tax apportionment by the simple expedient of earmarking the revenue from an otherwise unconstitutional tax to pay the costs associated with regulatory activity. The decision below, which approved such unapportioned flat taxes, should not stand. That decision cannot be reconciled with *Scheiner* and others of this Court's precedents; contributes to a growing disarray in the lower courts about the meaning of the controlling Commerce Clause principles; encourages States in their continuing attempts to circumvent the clear apportionment rules announced by this Court; and reads a wholly illogical and unadministrable distinction into the law. In addition, notwithstanding the repeal of the Washington tax, the legal question presented here remains one of considerable significance in jurisdictions across the Nation. Review of the decision below accordingly is imperative.

A. The Decision Below Cannot Be Reconciled With This Court's Precedents

1. At the outset, there can be no doubt that the decision below is flatly inconsistent with this Court's precedents — and offers other courts and state taxing authorities a roadmap for evading Commerce Clause requirements. A fundamental

purpose of the Clause is to preclude States from "'tax[ing] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 280 (1987) (quoting *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984)). The Court has given force to this requirement by holding that a state tax will be deemed unconstitutional unless it satisfies *each* of the four parts of the familiar test first articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), *i.e.*, unless it "'[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'" *Jefferson Lines*, 514 U.S. at 183 (quoting *Complete Auto*, 430 U.S. at 279).

Satisfaction of the essential second prong of this test, that of fair apportionment of taxes between the States, is in turn determined by application of the so-called "internal consistency" test. As the Court has explained,

> *any* threat of malapportionment [is assessed] by asking whether the tax is "internally consistent" * * * . Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. *A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction*, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.

Jefferson Lines, 514 U.S. at 185 (emphasis added). See also *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U.S. 232, 247 (1987); *Armco*, 467 U.S. at 644-646. *All* taxes therefore must be judged for internal consistency, with failure of the internal consistency test establishing unconstitutionality of the tax as a matter of law. And flat taxes such as Washington's necessarily fail the test.

The Court's decision in *Scheiner*, which applied the internal consistency test to invalidate flat highway taxes that were identical in their essential elements to the levy challenged here, explains why this is so. *Scheiner* involved a challenge to two flat taxes — a "marker fee" and an "axle tax" — imposed by Pennsylvania on both interstate and intrastate truckers. See 483 U.S. at 273-275. In holding the taxes unconstitutional, the Court explained that the Commerce Clause "'by its own force created an area of trade free from interference by the States'" (*id.* at 280, quoting *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977)), and then concluded that

> [t]he unapportioned flat taxes * * * penalize some travel within the free trade area. Whether the full brunt, or only a major portion, of their burden is imposed on the out-of-state carriers, their inevitable effect is to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania. To pass the "internal consistency" test, a state tax must be of a kind that, "if applied by every jurisdiction, there would be no impermissible interference with free trade." *Armco Inc.* v. *Hardesty*, 467 U.S., at 644. If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred.

Id. at 284.

The reason is obvious: unapportioned levies necessarily impose cumulative burdens on interstate commerce that are

not borne by equivalent intrastate activity. Imagine, for example, a flat tax of $48 — like the one set by Washington in this case — that is imposed on all heavy trucks that use a State's roads. If identical taxes were imposed by the 48 contiguous States, an interstate truck that traveled across the country would pay annual fees of as much as $2304; an identical truck that confined its business to one State but traveled the same number of miles would pay only $48. As a consequence, it is inevitable that flat taxes are malapportioned because they "'bear much more heavily in the aggregate on a firm that sells in many places than on a firm otherwise identical * * * that sells in only one place.'" *Id.* at 285 n.20 (quoting Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1188 (1986)).[6]

With this principle in mind, one of the leading commentators in this area — and one cited as authoritative by the court below (see App., *infra*, 16a) — has explained that

> the imposition of *any* unapportioned flat state or local tax on a multistate business would appear to be vulnerable to attack under the "internal consistency" doctrine. * * * This conclusion follows inexorably from a simple

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[6] In this respect, flat taxes like the ones at issue here and in *Scheiner* are quite different from per-use fees like highway tolls. The latter type of fee is neither malapportioned nor discriminatory because it is calibrated to charge every user for each use of a particular service provided to the taxpayer (or to compensate the State for every expense imposed upon the State by the taxpayer). In the highway toll example, the traveler who takes ten trips on the highway will pay the toll ten times, while the traveler who passes through once will pay only a single toll; in-state travelers have no special advantage because the fee "'is based on some fair approximation of use or privilege for use.'" *Scheiner*, 483 U.S. at 289 (quoting *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines*, 405 U.S. 707, 716-717 (1972)).

> application of the "internal consistency" principle. If every state were to impose an unapportioned flat tax on business activities in which both intrastate and interstate enterprises engage, the interstate business would pay the tax in each state in which it did business, whereas its intrastate competitor would pay but a single tax in the state in which it did business. Because the tax is not apportioned to the activity carried on in the state, the interstate enterprise would bear a heavier tax burden than its intrastate competitor merely because it was engaged in interstate commerce — a paradigmatic "impermissible interference with free trade."

Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138, 153-154 (1988) (quoting *Armco*, 467 U.S. at 644) (emphasis in original; footnote omitted).[7] See also *Scheiner*, 483 U.S. at 303-304 (Scalia J.,

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[7] The Washington court noted that Professor Hellerstein, writing shortly after the decision in *Scheiner*, had observed that some pre-*Scheiner* courts distinguished between general revenue taxes and user fees, posing the question whether the distinction between fees imposed for regulatory purposes and general revenue taxes "'is a distinction that makes a constitutional difference insofar as the commerce clause (and "internal consistency") analysis is concerned.'" App., *infra*, 16a (quoting Hellerstein, *supra*, 87 MICH. L. REV. at 156). Significantly, however, the court omitted his answer to that question:

> there is no reason to believe that a regulatory license fee would be immune from the "internal consistency" requirement merely because it constituted an exercise of the state's regulatory power rather than an exercise of the state's taxing power. *Surely the evils that the "internal consistency" test are designed to combat are the same regardless of whether the unapportioned flat levy is an exercise of the tax power or the regulatory power. In each case, the licensee carrying on his trade in more than one*

dissenting) (the internal consistency principle as stated by the Court requires the invalidation of "any unapportioned flat tax on multistate activities"); *Tyler Pipe*, 483 U.S. at 254 (Scalia, J., dissenting) (same).

Indeed, it follows from the structure of a flat tax that such a levy not only is malapportioned, but also invariably discriminates against interstate commerce. "[T]he very nature of the market that interstate operators serve prevents them from making full use of the privilege * * * for which they have paid the State" a flat fee. *Scheiner*, 483 U.S. at 284 n.16. Thus,

> "the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego the privilege some of the time simply because of its interstate character, *i.e.*, because it operates in other States as well. In the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier."

Id. at 291 (quoting *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting)).[8]

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jurisdiction bears a greater financial burden than his intrastate competitor merely because he is engaging in interstate commerce with the consequent interference with free trade among the states. Hence there does not appear to be any sound policy basis for distinguishing the "fee" from the "tax" cases insofar as the application of the "internal consistency" doctrine is concerned.

Hellerstein, *supra*, 87 MICH. L. REV. at 157 (emphasis added).

[8] The Washington Supreme Court asserted on several occasions that petitioners did "not ask this court to revisit the trial court's finding that the regulatory fee was not discriminatory." App., *infra*, 7a. See *id.* at 10, 17a. This is not accurate. In fact, petitioners argued to the court below that "all flat, unapportioned taxes or fees are *inherently* discriminatory." Appellant's Rep. Br. 7 n.9

(emphasis in original). The Washington Supreme Court actually engaged and rejected this argument, refusing to find that "a failure of internal consistency *is* discrimination in fact" and holding that "[d]iscrimination in fact * * * must be proven beyond a reasonable doubt." App., *infra*, 18a (emphasis in original). Other courts, however, have held that empirical proof of discrimination is *not* required to invalidate a flat tax. As the Supreme Judicial Court of Massachusetts explained in a case that was virtually identical to this one, "[a]lthough the discriminatory impact of the fees is not precisely quantifiable because the stipulated facts do not include statistics regarding the average number of miles traveled annually in Massachusetts by local trucks and by those registered in other jurisdictions, it is intuitively obvious that local trucks derive far greater economic benefit from each of the challenged fees paid than do interstate trucks." *American Truckingg Ass'ns* v. *Secretary of Administration*, 613 N.E.2d 95, 101 (Mass. 1993). See *Black Beauty Trucking, Inc.* v. *Indiana Dept. of State Revenue*, 527 N.E.2d 1163, 1165 (Ind. Tax 1988) ("[t]he discriminatory impact [of a flat tax] on the interstate carrier is readily apparent"); *American Trucking Ass'ns* v. *Goldstein*, 541 A.2d 955, 957 (Md. 1988) (court finds it sufficient that "interstate carriers[] might tend to travel fewer miles in Maryland and thus pay a higher per-mile price"); *American Trucking Ass'ns* v. *Conway*, 566 A.2d 1335, 1337 (Vt. 1989) (court concludes that Scheiner held "flat highway user taxes inherently discriminatory against interstate commerce").

Further, contrary to the Washington Supreme Court's comment, the trial court *never* found that the Washington tax was not discriminatory. It simply found, in a summary judgment context, that petitioners had not yet proven that the tax was discriminatory. Petitioners made this point below, arguing that, if the Washington Supreme Court "for some reason should determine that quantifiable discriminatory impact must be proven by [petitioners] to sustain their Commerce Clause claim, the appropriate remedy on appeal is to remand this case for trial" because the trial court "never found that the Regulatory Fee was non-discriminatory or that [petitioners] could make no showing of quantifiable discrimination as a matter of law." Appellants' Reply Br. 8 n.9. The court below made no

2. The Washington tax plainly fails the internal consistency test; it is a flat, unapportioned levy that is imposed on trucks when they operate even a mile in the State of Washington[9] and that, if replicated by other States, would impose potentially crushing, cumulative burdens on trucks traveling in interstate commerce. Indeed, the court below implicitly *acknowledged* that the tax lacks internal consistency. See App., *infra*, 15a. In nevertheless upholding the constitutionality of the Washington levy, the court held that a tax need not satisfy the internal consistency test — and, in fact, is not "subject to the apportionment requirement" *at all* (*ibid.*) — so long as the revenues derived from the tax are used "for the purpose of financing regulation." *Id.* at 11a. This is so, the court reasoned, because "[t]he burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations." *Id.* at 11a (citations and internal quotation marks omitted).

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response to this request, instead misconstruing the trial court's denial of summary judgment as constituting a determination of the merits of the discrimination claim.

[9] As noted above (at 2 n.2), the Washington scheme provides mechanisms (single trip permits and "floater cards") that may reduce — but do not eliminate — the burden imposed by the Washington tax on some interstate carriers. Manifestly, these options do not obviate the cumulative burdens imposed on interstate commerce by the Washington tax (since if imposed by all States, interstate carriers still would pay multiple taxes while intrastate carriers would pay only one), and the court below properly did not suggest that their availability satisfies the apportionment requirement. Other courts have invalidated flat taxes that included similar reduced alternative flat fees for interstate trucks that made limited use of state roads. See, *e.g.*, *American Trucking Ass'ns, Inc.* v. *Secretary of State*, 595 A.2d 1014, 1015 (Me. 1991) (holding tax unconstitutional even though scheme allowed for purchase of five-day or half-year permit in lieu of flat annual fee).

Such reasoning led the court to reject fair apportionment as a requirement and to apply the analysis of *Pike* v. *Bruce Church*, which assesses the Commerce Clause validity of regulations themselves, *not* of levies used to pay for the regulatory activity.

This holding, however, rests on a manifest evasion of this Court's precedents. As noted above, the Court has established that "[a] failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction." *Jefferson Lines*, 514 U.S. at 185. And whatever the validity of the Washington court's distinction for Commerce Clause purposes between taxes and regulations, we would have thought it obvious that a tax whose revenues are dedicated to paying for the enforcement of a regulation is just that: a tax and *not* a form of regulation. This surely is a place for application of the "quacks like a duck" principle; the Washington court's contrary conclusion, which accords taxes differing constitutional treatment depending upon what they are called and what they pay for, "has no relationship to economic realities" and "focus[es] on [a] formalism [that] merely obscures the question whether the tax produces a forbidden effect." *Complete Auto*, 430 U.S. at 288.[10]

It therefore is no surprise that the Washington court's decision to hinge the constitutionality of the tax on the uses to which the tax revenue will be put departs from this Court's holdings in several fundamental respects. *First*, the court below disregarded the undeniable fact that the effect on

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[10] The Washington court's conclusion certainly draws no support from *Freeman* v. *Hewitt*, 329 U.S. 249, 253 (1946), cited at App., *infra*, 11a. While this Court drew a distinction in that case between taxes and regulations (*not* taxes used to support the regulations), it nowhere made the counter-intuitive suggestion that taxes are less burdensome because they *pay for* regulatory activity.

interstate commerce of the Washington tax is identical to that of the tax invalidated in *Scheiner*. In both cases the flat levies were imposed when a truck made "a commercial entrance[] into" the taxing State and therefore "plac[ed] a financial barrier around the State." *Scheiner*, 483 U.S. at 284. In both cases the taxes were of a sort that, if imposed by other States, would have a "'cumulative effect'" on interstate trucks that would "'not result from the mileage or distance traveled, but from the interstate character of the journey. The same mileage in one state would result in only one tax.'" *Id.* at 285 n.16 (quoting Lockhart, *State Tax Barriers to Interstate Trade*, 53 HARV. L. REV. 1253, 1269 (1940)). And in both cases the interstate vehicle paid for something that "'[i]n the general average of instances * * * is not as valuable to the interstate as to the intrastate carrier.'" *Id.* at 291 (citation omitted).

Moreover, in neither case did the tax "maintain state boundaries as a neutral factor in economic decisionmaking," with the consequence that each tax "exert[ed] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.* at 283, 286-287 (quoting U.S. Const., Art, I, § 8, cl. 3). As Justice Sanders noted in his dissent below, "[t]his conclusion necessarily holds true no matter how each of the states spends the resulting revenue." App., infra, 28a. Like the levy in *Scheiner*, the Washington tax accordingly "produce[d] a forbidden effect" (*Complete Auto*, 430 U.S. at 288) — and that is the crucial consideration for Commerce Clause purposes.[11]

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[11] As Justice Sanders explained (App., *infra*, 27a-28a):

> Consider, for example, the interstate trucker on a Boston to Seattle run. The total distance is 2,508 miles requiring travel through at least 11 different states. If each state charged a flat $10.00 fee for an annual road permit, plus a gross tonnage

Second, the distinction drawn by the Washington court — that between a tax whose revenues are used "for the purpose of financing regulation" and a tax whose revenues "may be used for other purposes" (App., *infra*, 11a) — simply makes no sense at all. For reasons we have just noted, the court plainly was incorrect in suggesting (*id.* at 11a (citation omitted)) that the "'burden on interstate commerce'" is reduced in any respect because the tax revenues are used to finance regulatory activity rather than, for example, highway maintenance or subsidized bean soup for state legislators. Again, *Scheiner* provides an illustration of the point. The taxes there were imposed on all trucks that traveled Pennsylvania's roads and were dedicated to financing "road-related expenditures," including "highway maintenance." 483 U.S. at 270, 271. The burden that those taxes imposed on trucks would not have been reduced (or affected in any way) if the revenues instead had been devoted to paying for safety inspections, sobriety checks, highway patrol salaries, or any other arguably regulatory activity. Indeed, such a "regulatory fee" would, if anything, appear to be *more* burdensome than a general revenue tax because it would be part of a package that subjected trucks to a double whammy:

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charge, the interstate trucker would pay $110.00 per year plus eleven times his applicable gross tonnage charge to ply his trade; whereas the truck with an equivalent gross number of miles wholly intrastate between Seattle and Spokane would pay but $10.00 total, plus one gross tonnage charge. Necessarily the intrastate trucker would be at a competitive advantage to his interstate counterpart because his "regulatory fee" would be less than a tenth of that required of his competitor, although the interstate trucker's use of Washington roads is considerably less. Such result discriminatorily burdens interstate commerce whether we call it a regulatory fee, a tax, or some other name.

the trucker would both pay the tax *and* bear the burden of potentially costly state regulation.[12]

Third, the test announced by the court below invites inconsistency and manipulation. Because that test is not grounded in Commerce Clause policies, there is no principled way to determine whether a given tax must be deemed a "regulatory fee." In this case, for example, the Washington court confidently declared the challenged tax to be regulatory, even though the court confined its description of the tax to the cursory assertion that the revenues it raised were used "to conduct safety inspections and programs." App., *infra*, 12a.[13]

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[12] This is not to deny, of course, that there may be circumstances in which there are relevant distinctions between general revenue taxes and special purpose fees. Some statutes, for example, accord differing treatment to the two types of levy; several of the cases relied upon by the court below involved just that sort of statutory interpretation. See App., *infra*, 12a (citing *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974) (addressing whether a particular charge is a "fee" within the meaning of the Independent Officers Appropriation Act of 1952, 31 U.S.C. § 483a, revised and recodified at 31 U.S.C. § 5701)); *id.* at 11a (citing *Union Pac. R. Co.* v. *Public Utility Comm'n*, 899 F.2d 854 (9th Cir. 1990) (addressing whether a particular levy is a "tax" within the meaning of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503(b)). Indeed, the state-court decision from which the court below derived its test for whether a levy is a "fee" involved that sort of determination. See *id.* at 12a (citing *Covell* v. *City of Seattle*, 905 P.2d 324, 325-326 (Wash. 1995) (determining whether a levy is a property tax or a regulatory fee for purposes of a Washington State constitutional provision containing a uniformity requirement for property taxes)). But these decisions have no bearing on the question whether the purposes of the Commerce Clause permit the drawing of a similar distinction between taxes and fees.

[13] In fact, the Washington tax was used for far more than safety inspections and programs. The tax also was used by the

But is a tax "regulatory" in this sense if it is used to finance voluntary safety courses for drivers, or to pay the salaries of the highway patrol officers who "regulate" driving, or to pay *both* for truck inspections and for highway cleanup after accidents?[14] Or could a State convert an unconstitutional "tax" into a permissible "regulatory fee" simply by announcing (perhaps after the time of collection) that the revenue would pay for regulatory activity? Because Commerce Clause policies provide no answers to these questions, the Washington court's approach makes the form of the tax dispositive and invites manipulation by legislative draftsmen — a danger that is particularly acute because the court below used a *state-law* test to determine whether a levy is a "fee" and therefore exempt from the federal apportionment requirement. By the same token, the Washington court's holding would allow States to pay for a wide range of activities through the imposition of flat fees, in the process exporting much of their tax burden onto out-of-state taxpayers. The inevitable consequence of such a rule would be to "divide and disrupt the market for interstate transportation services." *Scheiner*, 483 U.S. at 285.

Washington Utilities and Transportation Committee to fund the regulation of *intrastate* trucking under RCW 81.80, which involved both economic regulation and regulation of all other practices of the carriers. See Clerk's Papers at 51, 65-68, 421, 444, 850, 863-866.

[14] That the distinction drawn by the court below is not meaningful is suggested by the terms of the test the court applied. It asks "whether the primary purpose of the monetary assessment is to accomplish desired public benefits which cost money, or to regulate an industry or activity." App., *infra*, 12a. But any fee that raises funds that are used to pay for regulatory activity surely is imposed to "accomplish desired public benefits which cost money." Here, for example, the Washington tax raised revenue to pay for state activity that would further public safety.

B. The Lower Courts Have Taken Conflicting Approaches To the Commerce Clause Apportionment Requirement

In addition to departing from this Court's precedents, the decision below contributes to considerable confusion and disarray among state courts of last resort and federal courts of appeals about the applicability of the apportionment requirement to taxes whose revenues are used to finance regulatory activity. Many courts have faithfully applied the analysis of *Scheiner*, holding in a range of settings that flat taxes on interstate commerce (in particular, on interstate motor carriers) fail the internal consistency test and therefore are unconstitutional. Other courts, however, have adopted the approach used below and departed from *Scheiner*, ruling that exactions need not be apportioned so long as they are levied to finance regulatory activity.

1. On the one hand, the Washington court's holding cannot be reconciled with a body of decisions that have applied the internal consistency test to invalidate taxes on interstate truckers, even when the tax was enacted for ostensibly regulatory purposes and even if it was denominated a "fee." In *American Trucking Ass'ns, Inc.* v. *Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993), for example, the Supreme Judicial Court of Massachusetts struck down an impost that in all essential respects was identical to the one here. Massachusetts imposed a flat $200 fee on every vehicle that entered the State and that was engaged in the transportation of hazardous waste. The fee was used "'solely for the purpose of administration and implementation of the permitting, compliance and enforcement, monitoring and analysis, and technical assistance programs at the department of environmental protection'" (*id.* at 99 (citation omitted)); it paid for the "random inspection of vehicles, processing monthly reports, providing education and technical assistance, and enforcement." *Id.* at 102.

In holding the tax invalid under the Commerce Clause, the court began by noting that "[i]t is of no relevance what label is attached to the assessment imposed by the State" so long as the fee has "an impermissible effect on free trade." 613 N.E.2d at 99 n.9. From that starting point, the court went on to hold the tax unconstitutional, explaining that it

> appear[s] to violate the internal consistency test because the imposition of the full measure of [the] fee is triggered by an interstate truck simply crossing the border of Massachusetts and making just one commercial entry into the State. If each State imposed [a] flat fee[] of th[is] type[] for passing through its jurisdiction, an impermissible interference with free commerce would result. The * * * fee[] also appear[s] unfairly apportioned because [it is] unapportioned and unrelated to actual use of Massachusetts highways.

Id. at 101. The court found "no merit to the Commonwealth's claim that the internal consistency test does not apply to user fees" (*id.* at 102) and did not treat the use that the State made of the revenues collected under the fee as at all relevant to the Commerce Clause inquiry.

The Supreme Judicial Court of Maine reached the same conclusion in *American Trucking Ass'ns, Inc.* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991), where the court invalidated another flat, annual per truck "hazardous material fee" imposed on vehicles that transported hazardous substances in the State. *Id.* at 1015. The fee was devoted, in part, to paying "costs related to vehicle inspection and enforcement" (*ibid.*); it also was used to support the state hazardous waste fund, to pay administrative costs, and to finance "hazardous materials training of state and local officials." *Ibid.* Explaining that *Scheiner* "clearly elevates substance over form," the court rejected the State's argument that the internal consistency test did not apply because the tax was characterized as a "[r]egulatory [l]icense [f]ee." *Ibid.* The

court went on to conclude that "a tariff such as the one imposed here is forbidden if it produces the prohibited discriminatory effect on interstate commerce whether designated as a 'fee' or a general revenue 'tax.'" *Id.* at 1016. That was true of the challenged levy, the court held, because

> if each state imposed such a fee, a truck traveling 100,000 miles interstate could conceivably pay 49 times more in hazardous waste tariffs than a truck that traveled 100,000 miles strictly within the state. This would clearly violate the "internal consistency test," which forbids tariffs that would interfere with free trade by penalizing some travel.

Id. at 1017.[15]

Similarly, in *Government Suppliers Consolidating Servs., Inc.* v. *Bayh*, 975 F.2d 1267 (7th Cir. 1992), cert. denied, 506 U.S. 1053 (1993), the Seventh Circuit rejected the distinction relied upon by the court below. *Government Suppliers* invalidated a flat semi-annual fee imposed on vehicles that engaged in municipal waste collection and transportation. The fees were "used to implement the waste disposal regulatory system to which registrants are subject. They d[id] not revert to the state general fund. * * * [T]heir purpose [was] regulatory * * *." *Id.* at 1271 n.2. Relying on *Scheiner*, the court nevertheless held the fee to violate the Commerce Clause because it "raises a financial barrier around the State." *Id.* at 1281. The court added that, "[i]f

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[15] The court below attempted to distinguish *Secretary of Administration* on the ground that the Massachusetts levy was a "tax" while Washington's was a regulatory fee. App., *infra*, 15a. But the court made no attempt to justify this *ipse dixit*; it did not explain *why* the Massachusetts levy was not just as "regulatory" as Washington's. Curiously, although the Maine Supreme Judicial Court's decision in *Secretary of State* also was cited to the court below, the Washington court made no attempt to reconcile that decision with its holding in this case.

other states were to adopt registration fees similar to Indiana's, the divisive and disruptive effect on interstate commerce in municipal waste would be magnified." *Id.* at 1282. Again, the court did not treat the regulatory purpose of the fee as in any way relevant to the Commerce Clause inquiry.[16]

2. Other courts, however, have adopted the approach taken below, holding that the apportionment requirement does not apply to exactions that are used to finance regulatory activity. Thus, in *Interstate Towing Ass'n* v. *Cincinnati*, 6 F.3d 1154 (6th Cir. 1993), the Sixth Circuit upheld Cincinnati's $80 annual fee imposed on operators of automobile towing services. The court treated the internal consistency test as inapplicable because "the City is simply trying to regulate what it reasonably thinks is a potentially dangerous or troublesome activity." *Id.* at 1165. In contrast to the tax invalidated in *Scheiner*, the court reasoned, "the City's fee is assessed to help defray the costs of inspecting towing vehicles to ensure that all trucks providing towing

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[16] In addition, many other courts have invoked *Scheiner* to invalidate a wide range of flat taxes or fees without suggesting that their purpose, or the use to which the revenue they generated was put, had any bearing on the analysis used to determine their constitutionality. See, *e.g.*, *Trailer Marine Transport Corp.* v. *Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992) (invalidating flat annual fee used to support no-fault insurance fund); *Kentucky* v. *American Trucking Ass'ns*, 746 S.W.2d 65, 67 (Ky. 1988) (invalidating flat highway privilege tax); *Black Beauty Trucking, Inc.* v. *Indiana Dept. of State Revenue*, 527 N.E.2d 1163, 1165 (Ind. Tax 1988) (invalidating flat highway privilege tax); *American Trucking Ass'ns* v. *Goldstein*, 541 A.2d 955, 957-958 (Md. 1988) (invalidating flat fuel tax registration fee); *American Trucking Ass'ns, Inc.* v. *State*, 556 N.W.2d 761 (Wis. Ct. App.) (invalidating flat hazardous waste transportation fee), rev. denied, 560 N.W.2d 274 (Wis. 1996); *American Trucking Ass'ns* v. *Conway*, 566 A.2d 1335, 1337-1338 (Vt. 1989) (invalidating flat fuel-user license fee).

services within City limits, Ohio-based and out-of-state-trucks alike, meet certain standards of safety." *Id.* at 1162-1163. The Sixth Circuit therefore applied only the *Pike* test and proceeded to hold the tax constitutional. *Id.* at 1163-1165.

Similarly, in *V-1 Oil Co.* v. *Utah State Dept. of Public Safety*, 131 F.3d 1415 (10th Cir. 1997), the Tenth Circuit upheld a flat Utah license fee and $30 annual fee imposed for each employee of entities that sell liquefied petroleum gas ("LPG") in the State. See *id.* at 1418. Like the court below, the Tenth Circuit applied a state-law test to determine whether the levy should be characterized as a "tax" or a "fee," concluding that it was a "regulatory police power fee" (*id.* at 1422) because it was "assessed to help defray the costs of inspecting LPG facilities and to ensure that all LPG handlers providing LPG services within the State of Utah met minimum standards of safety." *Id.* at 1423. The court therefore analyzed the tax under the standards announced in *Pike* and held it constitutional. See *id.* at 1423-1427. See also *Dept. of Banking & Finance* v. *Credicorp, Inc.*, 684 So.2d 746, 752 (Fla. 1996) (upholding a flat $200 semiannual fee on retail installment sellers on the understanding that the *Complete Auto* test applies only to "general revenue" taxes).

This flat inconsistency in the approaches of the lower courts warrants this Court's attention. Courts are applying the Commerce Clause in fundamentally differing ways, leading to the invalidation in some jurisdictions of taxes that are identical to those that have been upheld elsewhere. In these circumstances, the Court should grant review to bring uniformity to this important area of the law.

C. The Question Presented Here Is An Important And Recurring One

For the reasons set out above, the Washington court's holding both departs from this Court's decisions and exacerbates a conflict among the lower courts. This case also satisfies the remaining requisite for review by this Court:

notwithstanding the prospective repeal of the Washington tax, the question presented here — whether a State may avoid apportioning its taxes so long as it devotes the tax revenue to the financing of regulatory activity — is a recurring one of continuing practical importance.

First, as the conflict in the lower courts makes clear, jurisdictions across the Nation continue to impose unapportioned taxes on interstate commerce — and, indeed, many impose flat taxes on interstate motor carriers that are indistinguishable in principle from the Washington tax at issue in this case. A number of States, for example, impose flat per-vehicle or per-carrier fees on transporters of hazardous materials.[17] Revenues from these fees typically are devoted

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[17] See, *e.g.*, Cal. Vehicle Code §2502(c) ($100 motor carrier permit fee and $75 motor carrier renewal permit fee); Col. Rev. Stat. Ann. § 42-20-202(b), (c) (transporters of hazardous waste pay flat annual fee, depending on number of vehicles operated in State, of $10 to $400; $25 single trip permit); Conn. Gen. Stat. Ann. § 22a-454(a) ($500 annual fee on transporters of hazardous waste); Code Del. Reg. § 10-400-007 ($300 annual fee on transporters of hazardous waste); Ga. Code § 46-11-4 (i) ($100 annual motor carrier company permit fee); Iowa Code Ann. § 455B.424(5)(c) ($25 fee for transporters of hazardous waste); Kan. Ad. Reg. § 28-31-10(f) ($250 annual "monitoring fee" on transporters of hazardous waste); Md. Code Ann. § 7-252(a)(2), (b)(2)(ii) (annual $50 vehicle certificate fee for hazardous materials transporters; annual $20 driver certificate fee); Mich. C.L.A. § 29.473(b)(3) (in addition to apportioned fee, transporters of hazardous waste pay $50 "administrative fee"); Minn. Stat. Ann. § 221.0355(4)(b) (in addition to apportioned fee, transporters of hazardous waste pay $50 "processing fee"); Nev. Rev. Stat. § 459.9805(1)(b), (d) ($125 "general processing fee" for transporters of hazardous materials; $500 triennial "permit review fee"); N.J. Stat. Ann. §§ 7:26G-3.3(g) and 28 N.J.R. 1693, 1735 (Apr. 1, 1996) (flat hazardous waste transporter fee of $21 per cab, $85 per transport unit with a capacity of less than one ton, $191 per transport unit having a

to regulatory, enforcement, and administrative expenses identical to those found dispositive by the Washington Supreme Court.[18] The validity of the test used below to

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capacity greater than one ton, and $212 per cab and permanently attached unit with a capacity greater than one ton); N.M. Stat. Ann. § 74-4F-3(C) (annual $250 hazardous waste transporter permit fee; $75 single shipment hazardous waste fee); N.Y. ECL § 72-0502 (hazardous waste transporter pays annual $500 fee for first vehicle, $200 fee for each additional vehicle; other waste transporters pay $250 annual fee for first vehicle and $100 for each additional vehicle); N.C. Gen. Stat. § 130A-294.1(j) ($600 annual fee on transporters of hazardous waste); Ohio Rev. Code § 4905.80(C)(1)(a) (in addition to apportioned fee, hazardous waste transporters pay $50 "processing" fee); Tenn. Code Ann. § 68-212-203(a)(6)(C) ($650 annual fee on each person issued hazardous waste transporter permit); Tex. Natural Resources Code § 113.131k (d)(1) (liquefied petroleum gas trailers and delivery units pay flat annual fee of $100 to $300); Tex. Natural Resources Code § 116.072 (c)(1) (trailers and delivery units transporting compressed natural gas pay flat annual fee of $100 to $500); Wy. Stat. § 37-14-103 ($200 fee for each package of radioactive material transported in State).

[18] See, *e.g.*, Col. Rev. Stat. Ann. §§ 42-20-107, -202(5) (fee placed in hazardous materials safety fund and used for safety and administration purposes); Conn. Gen. Stat. Ann. § 16a-106(c) (fee used for "administering the provisions of this section"); 7 Del. Code Ann. § 6006(5)) (fee used "to carry out the purposes of this chapter"); Kan. Stat. Ann. § 65-3431(u) (fee used "for monitoring the transportation of hazardous wastes"); Mich. C.L.A. § 29.475(4) (fee devoted to "implementation of this act"); N.J. Stat. Ann. § 13:1E-18 and N.J.R. 1995(a), 1996 (Aug. 15, 1988) (fees devoted to "services to be performed," including hazardous waste transporter enforcement operations, special investigations, and roadside checks); N.Y. ECL § 72-0201(11)(b) (one-half of hazardous waste transporter fees used "for the purposes of carrying out the provisions of this chapter"); N.C. Gen. Stat. § 130A-294.1(b) (fee used to provide technical assistance, facilitate "timely

uphold the Washington tax accordingly raises a vital question that will have to be addressed by this Court sooner or later. This case offers an entirely suitable vehicle with which to do so.

Second, the Washington court's decision will foment continuing litigation about the validity of unapportioned taxes. In response to the holding in *Scheiner*, several States candidly acknowledged that their flat motor carrier fees were unconstitutional.[19] But other States began a lengthy and continuing campaign to circumvent *Scheiner* by arguing, for example, that apportionment of their flat taxes was impracticable and therefore unnecessary,[20] or by contending that their taxes *were* per se properly apportioned because they were "user fees,"[21] or by asserting that the apportionment requirement was inapplicable because the costs imposed upon the State were unrelated to the miles traveled by the taxpayer in the jurisdiction.[22] The decision below marks the latest skirmish in this campaign, and the first in which a State has been successful in defending a flat tax on interstate motor carriers. If not set aside, that decision will provide powerful

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review of permit applications," insure that permit decisions are made on a sound basis, "[i]mprove monitoring and compliance of the hazardous waste management program," "[i]ncrease the frequency of inspections," provide support for the waste management program, and provide resources for emergency response).

[19] See, *e.g.*, *Goldstein*, 541 A.2d at 957, 958; *Conway*, 566 A.2d at 1337.

[20] See, *e.g.*, *American Trucking Ass'ns, Inc.* v. *State*, 566 N.W.2d at 767-768.

[21] See, *e.g.*, *Secretary of Administration*, 613 N.E.2d at 101-103.

[22] See, *e.g.*, *Secretary of State*, 595 A.2d at 1016.

support and encouragement for substantial additional litigation in this area.[23]

Third, the decision below will leave state and local governments in confusion about the rules governing their taxing authority. When presented with the Washington Supreme Court's decision and conflicting holdings by other courts, legislators contemplating the enactment of new tax measures will not know whether unapportioned fees are constitutional so long as the revenues are dedicated to regulatory purposes. At the same time, legislators in jurisdictions that now have such fees will not know whether they are obligated to repeal or modify them — a matter of considerable practical importance, because continued collection of unconstitutional taxes may make the taxing jurisdiction liable for very substantial refund liability. See, *e.g.*, *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529 (1991); *McKesson Corp.* v. *Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). If flat "regulatory fees" are constitutional, legislators should be so informed and permitted to exercise their taxing authority freely; if those fees violate the Commerce Clause, the governing rules should be stated clearly so that States and localities may conform their taxes to constitutional requirements.

Fourth, the validity of the Washington tax is a matter of great importance to the taxpayers in this case, who continue to seek relief in the form of refunds. Those taxpayers were compelled to pay what we regard as a patently

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[23] Indeed, in litigation now pending in New Jersey, the State is defending a flat truck tax with arguments identical to those adopted by the court below in this case. *American Trucking Ass'ns, Inc.* v. *State of New Jersey*, No. A-0006334-97T3F (N.J. Super. Ct. App. Div.) See N.J. Br. 1 (levies should be upheld and *Scheiner* found inapplicable because challenged levies are "regulatory user fees, and not general revenue-raising taxes").

unconstitutional tax — and then were frustrated at every turn by the state courts as they attempted to obtain relief. The trial court recognized that the tax was unconstitutional, but disregarded *McKesson* and the other clear precedents of this Court that mandated the payment of refunds. The Washington Supreme Court took an equally insupportable tack, disregarding a different set of precedents to uphold the tax outright. Having forced the taxpayers to pay an unconstitutional levy, the State should not succeed in circumventing review and keeping the revenue by repealing the invalid provision after its unconstitutional demand has been satisfied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1999

APPENDIX

APPENDIX A

FRANKS & SON, INC. AND COAST EXPRESS, INC.,
on behalf of themselves
and all others similarly situated, Appellants,

v.

THE STATE OF WASHINGTON; WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION;
AND OFFICE OF THE STATE TREASURER, Respondents.

No. 65255-4.

Supreme Court of Washington,
En Banc.

Argued Feb. 11, 1998.

Decided Nov. 12, 1998.

DOLLIVER, J.

In 1990, Plaintiffs Franks & Son, Inc. and Coast Express, Inc. brought a class action suit on behalf of themselves and all other similarly-situated interstate truckers challenging the gross weight regulatory fee imposed by former RCW 81.80.320. That statute was repealed in 1993 and replaced with RCW 81.80.321, which imposes a fee based on gross income from operations occurring inside Washington state. In 1996, the Thurston County Superior Court held the repealed statute violated the Commerce Clause of the United States Constitution but, in a declaratory ruling, granted the Plaintiffs only prospective relief. Both parties directly appealed that decision. The Plaintiff-taxpayers argue they are entitled to retroactive relief in the form of a refund of taxes paid. The State maintains the former statute was valid under the Commerce Clause and, in the alternative, that any holding of unconstitutionality should be prospective only. We retained the case and now reverse, finding the repealed statute imposed a constitutional regulatory fee. We decline to reach the issue of the trial court's remedy.

The State of Washington regulates the trucking industry and formerly funded all of the associated costs with a regulatory fee, the proceeds of which could be used only to offset the costs of regulation. Laws of 1971, 1st Ex. Sess., ch. 143, § 5, previously codified as RCW 81.80.320. The regulatory fee at issue was required by former RCW 81.80.320, which was repealed effective January 1, 1994, and provided:

> In addition to all other fees to be paid by him, every "common carrier" and "contract carrier" shall pay to the commission each year prior to receiving his identification decal or stamp or number for each motive power vehicle operated by him, based upon the maximum gross weight thereof as set by the carrier in his application for his regular license plates, plus any additional tonnage or log tolerance permits, the following fees: [Fees ranged from $7 for vehicles weighing less than 4,000 pounds to $48 for vehicles weighing 72,000 pounds or more.]
>
> It is the intent of the legislature that the fees collected under the provisions of this chapter shall reasonably approximate the cost of supervising and regulating motor carriers subject thereto, and to that end the utilities and transportation commission is authorized to decrease the schedule of fees provided in this section by general order entered before November 1st of any year in which it determines that the moneys then in the motor carrier account of the public service revolving fund and the fees currently to be paid will exceed the reasonable cost of supervising and regulating such carriers during the next succeeding calendar year. Whenever the cost accounting records of the commission indicate that the schedule of fees as previously reduced should be increased such increase, not in any event to exceed the schedule set forth in this section, may be effected by a similar general order entered before November 1st. Any decrease or increase

> of gross weight fees as herein authorized, shall be made on a proportional basis as applied to the various classifications of equipment.

The annual regulatory fee was imposed in addition to a federally authorized "identification fee" which Congress and the Interstate Commerce Commission (ICC) established to offset state costs for filing and processing carriers' proof of interstate operations. Former RCW 81.80.300 made it unlawful for any carrier to operate vehicles within Washington unless both the identification fee and the regulatory fee were paid:

> It shall be unlawful for any "common carrier" or "contract carrier" to operate any motor vehicle within this state unless there is carried within the cab of the motive power vehicle ... the identification cab card and decal or stamp or number required by this section and the payment by such carrier of a total fee of up to ten dollars for each such decal or stamp or number plus the applicable gross weight fee prescribed by RCW 81.80.320[.]

The regulatory fees were the Washington Utilities and Transportation Commission's (UTC) sole source of funding for the motor carrier safety enforcement program, which was one component of "supervising and regulating motor carriers." Former RCW 81.800.320. Within statutory ceilings, the UTC set the fee by order each August or September for the following year, and the carriers were notified of the amount shortly thereafter.

Unlike the federal fee, state law also allowed the UTC to establish alternatives to the per vehicle fee for carriers which traveled in interstate commerce and entered Washington infrequently. The UTC made such allowances by establishing single trip permits and "floater cards" which permitted carriers to purchase a limited number of such cards and transfer them

among vehicles as they were sent into the state. Former RCW 81.80.300; RCW 81.80.318.

This case involves a constitutional challenge to the regulatory fee imposed by the UTC pursuant to former RCW 81.80.320, which was repealed effective January 1, 1994. In their complaint, filed in March 1990, Plaintiffs sought declaratory, injunctive, and refund relief on behalf of the following class certified by court order in September 1990:

> All interstate motor carriers whose vehicles travel in and through the State of Washington and are therefore subject to and pay the regulatory fee pursuant to RCW 81.80.320.

Clerk's Papers at 332. The Plaintiffs made two constitu-tional claims. First, they contended the regulatory fee was unconstitutional because it imposed an unlawful burden on interstate commerce pursuant to the United States Supreme Court's "dormant" or "negative" Commerce Clause analysis in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987). Plaintiffs claimed:

> The Regulatory Fee imposes an unappropriated, flat tax on Carriers unrelated to the actual miles a Carrier's motive power vehicles travel in Washington. The Regulatory Fee, therefore, imposes, on average, a higher cost per mile traveled in Washington on the motive power vehicles of Plaintiffs and all members of Plaintiffs' class that are not operated wholly within Washington than in the motive power vehicles of motor common or contract carriers that are operated wholly within Washington.

Clerk's Papers at 13. This claim became known as the "Scheiner " claim.

Second, Plaintiffs alleged the fee was preempted by federal law, specifically the Interstate Commerce Act, 49 U.S.C. § 11506, and its implementing regulations, and was thus imposed in violation of the Commerce Clause and its

affirmative reservation of power to Congress to regulate commerce between the states. This claim became known as the "preemption" claim.

In April 1990, Plaintiffs sought a preliminary injunction requiring the State to place into escrow regulatory fee proceeds not yet expended together with all fees collected pending the outcome of the case. The request was based on Plaintiffs' claim that, should they ultimately prevail on the merits, the State might assert an immunity defense to any refund claim.

In July 1990, the trial court issued an oral opinion denying the motion, noting that refunds would be "questionabl[e]." Clerk's Papers at 283. Addressing the Scheiner claim, the court acknowledged the necessity of proving discrimination with a factual showing:

> In Scheiner, of course, taxes were collected for highway construction and repair, which is necessarily correlated with the number of miles traveled. The regulatory fees at issue here fund various programs, including a vehicle safety inspection program. Although these inspections and the safety issues may well be directly related to miles traveled, as in the Scheiner case, this correlation has not at this juncture been established by the evidence.

Clerk's Papers at 280. The trial court concluded that "without that evidence, the court cannot determine that the plaintiffs are likely to prevail on the merits." Clerk's Papers at 281. The trial court also noted the Plaintiffs could protect themselves by bringing the matter to the merits before the next round of fee payments were due. In a later written order denying Plaintiffs' motion, the trial court reiterated its hesitance to rule favorably on the Scheiner claim in the absence of supporting evidence and found Plaintiffs were not likely to prevail on the preemption claim either.

Before the next year's fees were due, all parties moved for summary judgment. In March and April 1991, the trial court issued a letter opinion and corresponding order denying the parties' cross motions for summary judgment on the Scheiner claim and reaffirming its earlier view that the preemption claim should be denied. With respect to the Scheiner claim, the trial court again noted it was Plaintiffs' burden to prove the "factual unfairness" of the regulatory fee, or, in other words, to produce evidence of discrimination. The trial court stated:

> When Plaintiffs in this case sought temporary relief, the state argued, and I agreed, that those challenging the regulatory fee through commerce clause analysis have the burden of proving factual unfairness of the tax burden's effect on interstate commerce. Basically, Plaintiffs still have offered no admissible evidence on the issue....

Clerk's Papers at 939-40.

From March 1991 to April 1996, further pursuit of discovery and various attempts to resolve the case through alternative means ensued. In the interim, the regulatory fee legislation was repealed by Laws of 1993, ch. 97, § 7. (Federal legislation in the form of the Intermodal Surface Transportation Efficiency Act of 1991, Pub.L. No. 102-240, 105 Stat.1914, intervened, authorizing the ICC to create a base state registration system for interstate carriers. Each state could impose a fee in lieu of the registration fee, not to exceed that amount earlier charged (in Washington's case, $10), and that fee would be collected by the carriers' base state and then transmitted to each state imposing the fees. The Congressional decision that each state could not register all carriers doing business in that state made it administratively difficult to impose any further regulatory fee in addition to the base state fee. The regulatory fee was therefore repealed on the date of the implementation of the base state program—January 1, 1994.)

In April 1996, Plaintiffs filed a second motion for summary judgment. They again challenged the regulatory fee on the basis of both the preemption claim and the Scheiner claim. This time they supported the Scheiner claim with a discrimination analysis which attempted to show that members of the Plaintiffs' class paid more per mile in fees than nonclass members. In their cross motion for summary judgment, the State successfully rebutted this evidence. In a declaratory ruling, the trial court determined federal law did not preempt imposition of the regulatory fee. Moreover, Plaintiffs had not demonstrated that the fee was discriminatory. Nevertheless, the trial court held the regulatory fee violated the Commerce Clause because it was not fairly apportioned—specifically, it failed the "internal consistency" test required by dormant Commerce Clause analysis. The court found the regulatory fee was "much like" the fees charged users in Scheiner and was therefore subject to the internal consistency test for fair apportionment, which it failed. Clerk's Papers at 1506. The trial court ruled its decision should not be applied retroactively and denied Plaintiffs' request for a refund of taxes paid.

Plaintiffs now appeal, claiming they are entitled to retroactive relief, i.e., a full refund of fees paid since March 1987. Plaintiffs also ask this court to find the trial court wrongly decided the preemption claim. They do not appeal any of the rulings associated with the Scheiner claim (on which they prevailed); specifically, they do not ask this court to revisit the trial court's finding that the regulatory fee was not discriminatory.

The State cross-appeals, arguing the regulatory fee was not a tax and did not discriminate against interstate commerce; therefore, it claims, the trial court should not have declared it internally inconsistent (one measure of unfair apportionment) and hence unconstitutional. The State also responds to Plaintiffs' claims on appeal, arguing even if the regulatory fee

was unconstitutional, retroactive application of the trial court's ruling is not warranted. Finally, the State counters that Congress did not preempt the regulatory fee.

We hold the repealed statute imposed a regulatory fee—not a tax—and did not violate the Commerce Clause. Because we find the fee was constitutionally sound, we do not address the Plaintiffs' argument that they are entitled to refunds of fees paid.

U.S. Const. art. I, § 8, cl. 3, known as the Commerce Clause, states: "The congress shall have power ... [t]o regulate commerce with foreign nations, and among the several states[.]" The Commerce Clause does not forbid states from regulating interstate carriers for safety and other purposes, even if the scope of the state regulation differs from that of other states and imposes burdens on interstate commerce. See, e.g., *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523-24, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959). Likewise, a state may impose a fee to offset the appropriate costs of regulation. See, e.g., *Great N. Ry. Co. v. Washington*, 300 U.S. 154, 160, 57 S.Ct. 397, 81 L.Ed. 573 (1937); *Sprout v. City of South Bend*, 277 U.S. 163, 169, 48 S.Ct. 502, 72 L.Ed. 833 (1928). Indeed, even in the tax context, interstate commerce may be made to "pay its [own] way." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). The first question at issue here is whether the means by which Washington opted to fund its regulatory program violated the "dormant" or "negative" implications of the Commerce Clause.

On its face, the Commerce Clause is an affirmative grant of power to Congress. However, the negative implication of the clause—that the states cannot exercise power reserved to Congress—is the source of constitutional limits on state regulation and taxation of interstate commerce. Department of *Banking & Fin. v. Credicorp, Inc.*, 684 So.2d 746

(Fla.1996), cert. denied, --- U.S. ---, 118 S.Ct. 71, 139 L.Ed.2d 31 (1997).

Negative or "dormant" Commerce Clause analysis was at work in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987). In Scheiner, the United States Supreme Court held Pennsylvania's annual flat highway use taxes were "plainly discriminatory" because they imposed a cost per mile on interstate truckers that was approximately five times as heavy as the cost per mile borne by local truckers. *Scheiner*, 483 U.S. at 286, 107 S.Ct. 2829. Pennsylvania's flat taxes for the use of its roads also failed the "internal consistency" test, which, along with "external consistency," measures whether a tax is fairly apportioned. Internal consistency requires a state tax to "be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Scheiner*, 483 U.S. at 284, 107 S.Ct. 2829 (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984)). The Court concluded:

> If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred.

Scheiner, 483 U.S. at 284, 107 S.Ct. 2829 (footnote omitted).

The trial court analogized the regulatory fee at issue in this case to the flat highway use Scheiner taxes and found it did not pass the internal consistency test. It reached several crucial conclusions in its declaratory ruling. As a threshold matter, it declared former RCW 81.80.320 was facially neutral, i.e., it did not discriminate between interstate and intrastate carriers. Neither party contests this finding. Indeed, class carriers in this case paid the same as nonclass carriers; the regulatory fee was imposed on both.

Plaintiffs' claim on summary judgment, however, was that former RCW 81.80.320 was discriminatory in fact. Plaintiffs alleged that interstate carriers, generally, traveled fewer miles per year in Washington than intrastate carriers and therefore paid more per mile for the safety program, which the regulatory fee funded, than did intrastate carriers. Plaintiffs buttressed this allegation with the theory that the "burden" placed on Washington, which the safety program (and therefore the regulatory fee) was intended to ameliorate, was directly related to the miles traveled by each carrier. The trial court was not satisfied there was a relationship between miles and costs and therefore found the Plaintiffs had not proven the regulatory fee was discriminatory. Plaintiffs do not take issue with this portion of the ruling on appeal.

Having found there was no discrimination in fact, the trial court next addressed the question of "internal consistency" and asked whether imposition of a monetary assessment identical to the one in question by every other state would add no burden to interstate commerce that intrastate commerce would not also bear. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995). Because all states experience safety issues within their boundaries, the trial court reasoned, similar fees could be imposed, thereby creating a potential for multiple burdens on interstate commerce. The regulatory fee at issue therefore failed the internal consistency test. As a result, it was malapportioned and ran afoul of the Commerce Clause.

The problem with this analysis is that a *regulatory fee* is different from a *tax*. This dichotomy is more than semantics because, where *regulatory fees* have been found not discriminatory, apportionment, and therefore the internal consistency test, has not been at issue in the majority of cases. Having found the regulatory fee was not discriminatory, the trial court wrongly addressed apportionment.

The regulatory, police power of a state and its power to tax are treated differently for constitutional purposes.

> "[T]he burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations." *Freeman [v. Hewit*], 329 U.S. [249, 253, 67 S.Ct. 274, 91 L.Ed. 265 (1946)]. Because "[t]he power to tax is a dominant power over commerce .... [a]ttempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of [interstate] commerce." *Id.*

V-1 Oil Co. v. Utah State Dep't of Pub. Safety, 131 F.3d 1415, 1422-23 (10th Cir.1997). "Thus, determining the nature of the statute at issue is pivotal for purposes of analysis under the Commerce Clause." *Department of Banking & Fin.*, 684 So.2d at 750 (citations omitted).

A tax is imposed under a state's taxing power, while a fee is imposed under a state's regulatory power. Revenues from a fee are used exclusively for the purpose of financing regulation; revenues from a tax may be used for other purposes. In *Union Pac. R.R. Co. v. Public Util. Comm'n*, 899 F.2d 854 (9th Cir.1990), the Ninth Circuit held a regulatory fee imposed by Oregon was not a tax and therefore fell outside the scope of the prohibition in the Railroad Revitalization and Regulatory Reform Act (4-R Act) on state taxes that discriminate against rail carriers. Oregon's fee was similar to the UTC's regulatory fee in that none of the fee went to the general fund or was used for any purpose other than regulation. *Union Pac. R.R. Co.*, 899 F.2d at 857. The Ninth Circuit distinguished between the taxing power and the power to regulate commerce, stating:

> [T]he concerns underlying the constitutional limitations imposed on the taxing power by article I, section 8 are

> relevant to measures having the primary objective of raising revenues for the general support of government, but not to measures having the primary objective of regulating commerce. Thus, a levy to collect the costs of regulation from those regulated is not to be treated as a tax to which the limitations of article I, section 8 apply.

Union Pac. R.R. Co., 899 F.2d at 859 (citations omitted).

Whether an exaction is a tax or a fee depends on whether its purpose is to raise revenue or to regulate an industry or services. See, e.g., *National Cable Television Ass'n v. United States*, 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974). A tax is defined as a levy made for the purpose of raising revenue for a general governmental purpose; a fee is enacted principally as an integral part of the regulation of an activity and to cover the cost of regulation. *American Trucking Ass'ns v. O'Neill*, 522 F.Supp. 49 (D.Conn.1981).

We recently articulated a three-part test to determine whether a charge imposed by a governmental entity is a fee or a tax. The first factor to consider is whether the primary purpose of the monetary assessment is to accomplish desired public benefits which cost money, or to regulate an industry or activity. If the primary purpose is to raise revenue, rather than to regulate, then the charge is a tax. "Conversely, if the primary purpose is regulatory, 'the charges are properly characterized as "tools of regulation," rather than taxes.'" *Covell v. City of Seattle*, 127 Wash.2d 874, 879, 905 P.2d 324 (1995) (quoting *Teter v. Clark County*, 104 Wash.2d 227, 239, 704 P.2d 1171 (1985)). The primary purpose of the fee in this case was to regulate the trucking industry, and specifically to conduct safety inspections and programs.

The second factor which we consider is whether the money collected must be allocated only to the authorized regulatory purpose. *Id.* Under the repealed statute at issue

here, the proceeds of the regulatory fee could be used only to offset the costs of regulation. Plaintiffs do not dispute this.

The third and final inquiry is whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer. "Where such a relationship exists, then the charge may be deemed a regulatory fee even though the charge is not individualized according to the benefit accruing to each fee payer or the burden produced by the fee payer." *Id.* (citations omitted). Again, revenues from the regulatory fee in this case could be used only for the regulation of carriers; the Plaintiff class contains the vast majority—95 percent—of the carriers. Moreover, the fee was designed to rise (up to a statutory ceiling of $48) or fall, depending upon the actual costs of regulation. Former RCW 81.80.320.

We hold the repealed statute imposed a regulatory fee, not a flat tax. It remains to be determined whether the regulatory fee was unfairly apportioned and therefore violated the Commerce Clause, as the trial court held. We wish to address the trial court's rulings in context, however, and to do so, detour for a brief overview of the apportionment issue before turning to our analysis of the regulatory fee.

The United States Supreme Court has required that any state tax on interstate commerce must be (1) applied to an activity with a substantial nexus to the taxing state; (2) fairly apportioned; (3) nondiscriminatory against interstate commerce; and (4) fairly related to the services provided by the state, in order to pass constitutional muster. Complete *Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

If the regulatory fee were a tax, as Plaintiffs argue, then the question in this case would be whether the tax was properly apportioned within the meaning of the second prong

of the Complete Auto test, "the central purpose [of which] is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260-61, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989). The threat of malapportionment is assessed by asking whether the tax is "internally consistent" and, if so, whether it is "externally consistent" as well. The trial court in this case did not reach the question of external consistency, which looks to the economic justification for the State's claim upon the value taxed.

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.

Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995).

Although it found the regulatory fee was not discriminatory (under the third prong of the Complete Auto test), the trial court found it failed the internal consistency test, was therefore unfairly apportioned, and as such, violated the Commerce Clause. The trial court acknowledged that problems of highway safety requiring a safety program in Washington are problems common to all states, which could duplicate a regulatory fee on interstate carriers because the

safety issues within their boundaries are similarly implicated. This "potential for multiple burdens" on interstate commerce rendered the regulatory fee unfairly apportioned. Clerk's Papers at 1507.

Plaintiffs ask this court to accept the trial court's analysis, which holds that a finding of internal inconsistency alone, in the absence of discrimination in fact, invalidates a tax under the Commerce Clause. Plaintiffs are correct in pointing out courts, on internal consistency grounds, have overturned flat taxes imposed on interstate motor carriers without requiring proof of quantifiable discrimination. See, e.g., *American Trucking Ass'ns v. State*, 205 Wis.2d 494, 556 N.W.2d 761 (Wis.Ct.App.), review denied, 207 Wis.2d 285, 560 N.W.2d 274 (1996); *American Trucking Ass'ns v. Secretary of Admin.*, 415 Mass. 337, 613 N.E.2d 95 (1993).

The State, on the other hand, does not argue the regulatory fee was properly apportioned. Instead, it argues, and we agree, that the regulatory fee was not a tax subject to the apportionment requirement. Specifically, the State maintains a nondiscriminatory "fee" (as opposed to a tax) need not be apportioned. The cases cited by Plaintiffs for the proposition that a nondiscriminatory assessment may nevertheless be overturned on internal consistency grounds dealt overwhelmingly with taxes, not regulatory fees.

Courts have rejected claims that regulatory fees must be apportioned. See, e.g., *V-1 Oil Co. v. Utah State Dep't of Pub. Safety*, 131 F.3d 1415 (10th Cir.1997); *Interstate Towing Ass'n v. City of Cincinnati*, 6 F.3d 1154 (6th Cir.1993). Moreover, there are policy reasons that apportionment rationale should not be extended to nondiscriminatory regulatory fees. As the State points out, if regulatory fees must be apportioned, then other state or local regulatory fees designed to offset the legitimate costs of regulation would be jeopardized. For instance, various state agencies' licensing or filing fees intended to recoup even a portion of

administrative costs could be at risk. See also Walter Hellerstein, Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation, 87 Mich. L.Rev. 138 (1988). Professor Hellerstein identified "professional and similar licensing fees that are imposed by every state" as possible victims of strict application of internal consistency to nondiscriminatory regulatory fees:

> Many of these fees are flat and unapportioned, and, for that reason, could be challenged under the "internal consistency" rationale.... One feature of these licensing fees, however, arguably insulates them from challenge under the "internal consistency" doctrine. In contrast to ... exactions ... presumed to be imposed for general revenue purposes pursuant to the state's taxing power, the levies considered here are presumed to be imposed for regulatory purposes pursuant to the state's police power. However thin that distinction may be in some cases, it is a distinction the law recognizes, and the question for present purposes is whether it is a distinction that makes a constitutional difference insofar as commerce clause (and "internal consistency") analysis is concerned.

Hellerstein, 87 Mich. L.Rev. at 156 (footnotes omitted).

Turning now to the promised analysis of the regulatory fee under the Commerce Clause, we note that the stringent standard for appraising tax measures does not apply where the statute at issue qualifies as a regulatory measure:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that

> will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities....

Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) (citation omitted); see also *Department of Banking & Fin. v. Credicorp, Inc.*, 684 So.2d 746, 752-53 (Fla.1996) (inquiring "(1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.") (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979)).

The regulatory fee in this case was undeniably evenhanded. It was applied to class and nonclass carriers alike. The trial court found the regulatory fee was not discriminatory, and Plaintiffs do not contest this finding. The State argues the regulatory fee did not discriminate against interstate commerce, and, in any event, Plaintiffs were unable to provide evidence that it did. The State is correct. The regulatory fee was imposed on in-state and out-of-state carriers alike. Moreover, the Plaintiffs were unable to prove the regulatory fee forced them to bear a higher cost per mile than intrastate carriers, and the trial court stated Plaintiffs had not proven discrimination in fact.

What Plaintiffs appear to be claiming on appeal is that a failure of internal consistency is tantamount to discrimination, and that the trial court was "simply wrong" in not recognizing this. Br. of Appellants at 25. The problem with Plaintiffs' argument is that, even if the Complete Auto test applied in this case, unfair apportionment (and therefore internal consistency) is different from discrimination in fact. The

apportionment issue which internal consistency is designed to address looks to the potential for multiple burdens on interstate commerce; internal consistency "asks nothing about the degree of economic reality reflected by the tax[.]" *Oklahoma Tax Comm'n*, 514 U.S. at 185, 115 S.Ct. 1331. Discrimination in fact, however, must be proven beyond a reasonable doubt. *High Tide Seafoods v. State*, 106 Wash.2d 695, 698, 725 P.2d 411 (1986). The Plaintiffs are essentially bootstrapping, asking this court to find a failure of internal consistency *is* discrimination in fact. We decline to do so, especially in the context of regulatory fees, which are not required to be fairly apportioned.

Our second inquiry is whether the repealed statute served a legitimate local purpose. Plaintiffs do not dispute that the State of Washington has a legitimate interest in the regulation, inspection, and safety of trucks using state highways and roads. Indeed, the United States Supreme Court has "recognized the peculiarly local nature" of regulating interstate carriers for safety purposes. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959); see also *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978) (stating, "In no field has ... deference to state regulation been greater than that of highway safety regulation.").

We are convinced the regulatory fee served the legitimate local purpose of funding safety programs and inspections related to trucks on Washington's roads. It is worth noting that Plaintiff carriers pose significant safety concerns not posed by carriers which operate solely in state. For example, Plaintiff carriers are typically away from their bases for two to three weeks at a time, precluding service and maintenance from being performed on their vehicles. Intrastate carriers, on the other hand, are generally back at their bases each night, and as a result are closer to and more likely to avail themselves of maintenance facilities. Another significant

safety consideration is the fact that class carriers are paid on a mileage basis, which provides a powerful economic incentive to drive longer hours at a higher speed. Intrastate carriers, on the other hand, are not paid on a mileage basis. We also note *Franks & Son, Inc. and Coast Express, Inc.*, the class representatives in this case, have each been cited for numerous violations of state safety rules. *Franks & Son, Inc.* was cited several times for, among other things, hours-of-service violations. *Coast Express, Inc.* was cited 11 times during the period from January 1, 1987, to May 25, 1990, for safety violations, including hours of service, defective equipment, and driver disqualification. Clearly, regulation of these and other carriers was a proper exercise of the State's police power. During the time the regulatory fee was in place, the State of Washington had one of the better safety records in the nation, due, in part, to an exemplary inspection program by the UTC. The motor carrier safety program proved effective in reducing truck accidents as well as keeping illegal carriers from driving. The regulatory fee funded those efforts.

Finally, we ask whether alternative means could have promoted the State's legitimate interest in a regulatory safety program. Put another way, did the repealed statute place an undue burden on interstate commerce? Plaintiffs bear the burden of showing any incidental burden on interstate commerce was excessive compared to the local interest. Again, Plaintiffs have failed to provide evidence of anything more than an incidental burden on interstate commerce, and have not shown a "clearly excessive" burden. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). In fact, we are hard pressed to say that interstate commerce was even incidentally burdened. "Incidental burdens" on interstate commerce are the burdens on interstate commerce that exceed the burdens on intrastate commerce. *V-1 Oil Co. v. Utah State Dep't of Pub. Safety*, 131 F.3d 1415, 1425 (10th Cir.1997). There has been no proof that the

Plaintiff class of carriers, or interstate commerce, paid more for the regulatory program than did intrastate carriers.

Moreover, we note the UTC itself provided carriers with alternatives to the regulatory fee. These included floater cards, single trip regulatory fee cards, single trip permits, and lump sum regulatory fees. These options were beneficial to those interstate carriers whose vehicles were not present in Washington for significant periods of time.

The single trip permit and single trip regulatory fee card allowed carriers to forgo paying the annual regulatory fee and instead purchase such a permit or fee card at the border. Floater cards were useful for carriers operating on fixed routes, for example, from Los Angeles to Seattle. The carrier may have numerous vehicles in its fleet but not know which would be making the trip. A carrier could purchase several of the floater cards and keep them in Los Angeles to be given to a driver whose truck was dispatched to Seattle. These options, which were not available to intrastate carriers, but only to interstate carriers, could result in monetary savings to those who exercised them. That Plaintiffs chose not to use these alternatives is not evidence of a burden on interstate commerce.

Accordingly, we hold the repealed statute was a regulatory measure which did not violate the Commerce Clause. We reverse the holding of the trial court with respect to Plaintiffs' dormant Commerce Clause—or *"Scheiner"*—claim.

Neither do we find the regulatory fee was unconstitutional as a result of preemption by federal law. Plaintiffs claim the regulatory fee was preempted under 49 U.S.C. § 11506 (1978), in which Congress exercised its authority under the Commerce Clause and directed the ICC to adopt standards under which the states might require motor

carriers to prove the lawfulness of their interstate operations. The State persuasively argues otherwise.

Courts have traditionally employed a presumption against federal preemption of state law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). Federal law is not preemptive of state law unless Congress has unmistakably so ordained. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). Regulations purporting to preempt state authority therefore must clearly and unambiguously so intend:

> [B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means ..., we can expect that they will make their intentions clear if they intend for their regulations to be exclusive.

Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 718, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985).

There is, moreover, an additional and related judicial "'assumption that the historic police powers of the States [are] not to be superseded by ... Federal [law] unless that was the clear and manifest purpose of Congress.'" *Interstate Towing Ass'n v. City of Cincinnati*, 6 F.3d 1154, 1161 (6th Cir.1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)).

Accordingly, where, as here, the subject matter of the state statute is one within the state's traditional powers, the party arguing federal preemption must show that preemption was the "clear and manifest purpose of Congress.'" *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 206, 103 S.Ct. 1713, 1723, 75 L.Ed.2d 752 (1983) (quoting *Rice*, 331 U.S. at 230, 67 S.Ct. 1146).

The language Plaintiffs allege was preemptory is now repealed, but provided:

> The requirement of a State that a motor carrier, providing transportation ... register the certificate or permit issued to the carrier ... is not an unreasonable burden on transportation referred to in [49 U.S.C. § 10521(a)(1), (2)] when the registration is completed under standards of the Commission under subsection (c) of this section. When a State registration requirement imposes obligations in excess of the standards, the part in excess is an unreasonable burden.

Act of October 17, 1978, Pub.L. No. 95-473, 92 Stat. 1448, § 11506(b), formerly codified at 49 U.S.C. § 11506(b).

As the State points out, on its face, this language preempted only state registration requirements regarding proof of lawfulness of interstate operations outside the ICC "standards." The statute defines standards to "mean the specification of forms and procedures required by regulations of the [ICC] to prove the lawfulness of transportation...." 49 U.S.C. § 11506(a) (1978). There is nothing in the statute which purports to preempt state regulatory authority or its corresponding power to set regulatory fees. Congress merely authorized the ICC to set uniform registration requirements and to confine states to registering interstate carriers in keeping with those requirements. The charges at issue in the repealed state statute were regulatory fees, not fees for the registration of ICC permits.

Plaintiffs also claim collection of the regulatory fee and the federal identification fee at the same time resulted in an unlawful registration requirement exceeding ICC standards. This argument is not compelling. We believe a more realistic rationale for concurrent collection of the two fees was administrative convenience and efficiency.

Finally, we note that elsewhere in the Interstate Commerce Act Congress expressly preempted state taxes with the type of unambiguous language required. 49 U.S.C. §

14502 (limiting certain taxes on motor carriers). When Congress in one part of a statute preempts state law, the implication is that other matters are not preempted. See Cipollone, 505 U.S. at 517, 112 S.Ct. 2608. We affirm the holding of the trial court with respect to Plaintiffs' preemption claim.

DURHAM, C.J., AND SMITH, GUY, JOHNSON, MADSEN AND TALMADGE, JJ., concur.

SANDERS, J., dissenting.

The majority opinion rests on the fulcrum that a "regulatory fee" cannot violate the Commerce Clause absent further proof that it discriminatorily burdens interstate commerce in practical effect. I disagree. This fee discriminatorily burdens interstate commerce on its face.

Fee For Privilege To Use Roads
Violates Commerce Clause

Fine, lawyer-like distinctions between taxes, flat taxes, user fees, and regulatory fees find no place in the text of the Commerce Clause which simply provides, "[C]ongress shall have power ... To regulate commerce ... among the several States...." U.S. Const. art. 1, § 8. The Supreme Court has summarized the purpose of the Commerce Clause to create " 'an area of trade free from interference by the States.' " *American Trucking Assocs. v. Scheiner*, 483 U.S. 266, 280, 107 S.Ct. 2829, 2838, 97 L.Ed.2d 226 (1987) (citing Boston *Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328, 97 S.Ct. 599, 606, 50 L.Ed.2d 514 (1977)). Thus, even where Congress has declined to legislate, the Supreme Court has construed the language of the Commerce Clause to prohibit the erection of state barriers to interstate commerce by negative inference, known as the dormant Commerce Clause. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995).

Whether we characterize this charge as a "tax" or a "regulatory fee" doesn't matter in and of itself—only whether its measure places a heavier burden on interstate than intrastate activities, *Scheiner*, 483 U.S. at 281-82, 107 S.Ct. 2829, thus granting a competitive advantage to local truckers at the expense of their interstate competitors. Therefore, the focus of inquiry must be whether the challenged imposition puts interstate commerce to a competitive disadvantage against local commerce.

It may be true this so-called regulatory fee is in a sense compensatory to the State for resources consumed by all fee payers; however, this particular fee is at most compensatory only in a global sense for the total cost of those programs funded by the fee, without distinction between the two subclasses of fee payers: local and interstate truckers. But it is upon that distinction which the Commerce Clause turns. Whether the characterization as a regulatory fee is meaningful for the purposes of determining if a local jurisdiction is levying a tax absent that statutory authority required by our State Constitution is, however, a different question than that posed by the Commerce Clause. Compare *Covell v. City of Seattle*, 127 Wash.2d 874, 905 P.2d 324 (1995), which held that a municipal fee for street improvements is a tax.

Under the Commerce Clause we must hypothesize the imposition of this fee to every state, to test it in one. This we call the "internal consistency" test. We need not consider the actual "adverse economic impact in dollars and cents upon a participant in interstate commerce for crossing a state boundary" to know such discrimination against interstate commerce exists. *Scheiner*, 483 U.S. at 283-84 n. 15, 107 S.Ct. 2829. See also Majority at 1240 (" 'This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue ....'") (quoting *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995)).

Here, for example, we consider a $10.00 charge levied upon any truck for the privilege to operate within this State (RCW 81.80.300) plus a gross tonnage fee of up to $48.00 (RCW 81.80.320). The charge is fixed and flat regardless how many miles are driven, how many safety inspections are conducted, and, most importantly, regardless whether the

truck is engaged in wholly intrastate or interstate commerce.[1] But the latter distinction must be made for reasons stated by Justice Frankfurter, whose dissenting language in *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 557, 70 S.Ct. 806, 94 L.Ed. 1053, 17 A.L.R.2d 407 (1950) (Frankfurter, J., dissenting) was relied upon by the majority in Scheiner:

> So long as a State bases its tax on a relevant measure of actual road use, obviously both interstate and intrastate carriers pay according to the facilities in fact provided by the State. But a tax levied for the privilege of using roads, and not their actual use, may, in the normal course of operations and not as a fanciful hypothesis, involve an undue burden on interstate carriers. While the privilege extended by a State is unlimited in form, and thus theoretically the same for all vehicles, whether interstate or intrastate, the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego the privilege some of the time simply because of its interstate character, i.e., because it operates in other States as well. In the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier.

Capitol Greyhound Lines, 339 U.S. at 557, 70 S.Ct. 806 (Frankfurter, J., dissenting) (as quoted in *Scheiner*, 483 U.S. at 291, 107 S.Ct. 2829). In Scheiner the Supreme Court struck down Pennsylvania's flat-axle tax levied on each truck for the annual privilege of using Pennsylvania's roads. Here we have a flat $10.00 fee plus a flat tonnage fee for the annual privilege to use Washington's roads. In relevant principle

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[1] The negative effect of the fee may be mitigated, but not eliminated, by single trip passes. The vice survives in principle as the charge is still for the privilege of using the roads, not the consumption of state resources in any quantitative sense.

they are indistinguishable, notwithstanding Pennsylvania called it a tax whereas our majority calls it a fee.

Applying this principle to our facts, the subject fee is not apportioned between "the several states" so as to insure that the interstate trucks will not pay more than the truck which is operated wholly within the boundaries of Washington if the scheme were generalized to other states. That is the constitutional problem. I disagree with the majority that a regulatory fee on the privilege to use the roads of a state need not be apportioned to survive constitutional scrutiny, at least when that fee is not based on the consumption of state resources by the actual payer of the fee.[2]

Consider, for example, the interstate trucker on a Boston to Seattle run. The total distance is 2,508 miles requiring travel through at least 11 different states. If each state charged a flat $10.00 fee for an annual road permit, plus a gross tonnage charge, the interstate trucker would pay $110.00 per

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[2] The majority cites *V-1 Oil Co. v. Utah State Dep't of Pub. Safety*, 131 F.3d 1415 (10th Cir.1997) and *Interstate Towing Ass'n v. City of Cincinnati*, 6 F.3d 1154 (6th Cir.1993) for the proposition that a regulatory fee need not be apportioned; however, each distinguishes Scheiner as a case which concerns the privilege of making commercial entrances into a state. In *V-1 Oil* the court observed, "The fees involved here are not assessed 'for the privilege of making commercial entrances into' the State." *V-1 Oil Co.*, 131 F.3d at 1426 (citing *Scheiner*, 483 U.S. at 284, 107 S.Ct. 2829); whereas Interstate Towing similarly distinguished its facts from Scheiner as the fee at issue in *Interstate Towing* was "not charged for the privilege of using the City's streets...." *Interstate Towing Ass'n*, 6 F.3d at 1163. But the statute at issue here does exactly what *V-1 Oil* and *Interstate Towing* claim as the basis to distinguish Scheiner as this fee was assessed as a condition precedent to commercial entrances into Washington.

year plus eleven times his applicable gross tonnage charge to ply his trade; whereas the truck which ran an equivalent gross number of miles wholly intrastate between Seattle and Spokane would pay but $10.00 total, plus but one gross tonnage charge. Necessarily the intrastate trucker would be at a competitive advantage to his interstate counterpart because his "regulatory fee" would be less than a tenth of that required of his competitor, although the interstate trucker's use of Washington roads is considerably less. Such result discriminatorily burdens interstate commerce whether we call it a regulatory fee, a tax, or some other name.

That it also violates the Commerce Clause is not fairly debatable as "[i]f each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." *Scheiner*, 483 U.S. at 284, 107 S.Ct. 2829. This conclusion necessarily holds true no matter how each of the states spends the resulting revenue. Whether the money is placed in a trust fund for highway purposes or is spent on public education, the bottom line is interstate commerce is put to a competitive disadvantage. That is precisely what the Commerce Clause was enacted to prevent.

Although the aforementioned really disposes of the Majority's argument, we might go further to distinguish how a regulatory or user fee (or tax, for that matter) might pass Commerce Clause muster. Scheiner calls this "The User- Fee Defense" and discusses it in some detail. See *Scheiner*, 483 U.S. at 289-92, 107 S.Ct. 2829. A "user fee" is the purest form of regulatory fee in that it is a fee levied to compensate the government for resources expended on a particular user's behalf. A toll bridge fee might be an example, as would an airport service fee for the passenger's use of airport facilities. See *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972). Although these fees "burden" interstate commerce,

they do not violate the Commerce Clause because, as Franks and Son, Inc., put it, "if every state assessed a transaction-based $1.00 'user fee' for each passenger boarding a commercial aircraft operating from an airport within the state, no single boarding would be subject to more than one state's fee." Appellants' Reply Br. at 15.

In the case at bar, however, the fee is for the privilege of using the roads, not the degree of actual use to which they are put. The fee is not based upon the consumption of State resources by the interstate trucker. If permitted, this fee can be multiplied as the truck crosses each state boundary without regard to the actual use of the road system "or with some other proxy for value obtained from the State." *Scheiner*, 483 U.S. at 291, 107 S.Ct. 2829. The conclusion must therefore necessarily follow that

> when the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the Complete Auto Transit [*Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977)] test that the State is imposing an undue burden on interstate commerce.

Scheiner, 483 U.S. at 291, 107 S.Ct. 2829 (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 629, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981)).

In the same sense that a broken clock is right twice a day, the flat $10.00 fee, plus the gross tonnage charge, may be compensatory to the State in a given case, or in the aggregate of all such fees paid by all truckers, intrastate and interstate; however, compensatory in that sense or not, it still discriminates against interstate commerce because the interstate trucker, by definition, pays the same amount for the privilege to use the state's roads only part of the time, which the intrastate trucker pays to use the roads all of the time.

This fee cannot be distinguished from the one held unconstitutional in *Scheiner*.

Refund Is The Proper Remedy

Although the majority found it unnecessary to reach the question of remedy, because it found no constitutional violation, I conclude once the violation is established a full refund is appropriate.

Were we to call the remedy for this current application of an established principle to new facts "retroactive," then so be it as the United States Supreme Court has upheld such retroactive effect as the general rule, unless each of the following conditions to justify an exception is satisfied:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) (quoting *Linkletter v. Walker*, 381 U.S. 618, 629, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) and *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969)) (citations omitted).

Clearly the ruling, as I would posit it, finds its specific source by, at least, 1987 in the Scheiner case, and a refund of every payment subsequent to that date is appropriate without necessity of further discussion.

ALEXANDER, J., concurs.

APPENDIX B

SUPERIOR COURT
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FOR THURSTON COUNTY

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Letter Opinion

RE: *Frank & Sons, Inc., et al. v. WUTC, et al.*
Thurston County Cause No. 90-2-00495-1

Dear Counsel:

In October 1996, I determined that the State's regulatory fee to support a commercial vehicle safety inspection program was unconstitutional under the internal consistency test of the Commerce Clause of the United States Constitution. Both sides have presented extensive argument and briefing on the issue of whether Plaintiffs should be refunded fees paid under this program.

Principles of retroactivity have been addressed in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The Supreme Court set forth three factors for analysis:

1. For the decision to be applied nonretroactively (prospectively), the decision must establish a new principle of law, either by overruling clear past precedent on which litigants have relied or by deciding an issue of first impression the resolution of which was not clearly foreshadowed;

2. The court must determine whether retroactive operation will further or retard the operation of the decision; and

3. If a retroactive decision would produce substantial inequitable results, the court may order nonretroactivity to avoid the injustice or hardship.

Plaintiffs argue that the case of *American Trucking Associations,Inc. v. Scheiner*, 483 U.S. 266 (1987), hereinafter referred to as *Scheiner,* clearly foreshadowed the result in this case. Defendants argue that this result was not foreshadowed by Scheiner and that Plaintiffs, in fact, did not even argue the internal consistency test in the early proceedings in this case. I have carefully reviewed the eight volumes of pleadings and briefs in this case as well as the cases relied upon — and, in particular, the *Scheiner* case. Here is what I have found:

1. Plaintiffs' 1990 complaint alleged that the State's regulatory fee violated the Commerce Clause of the United States Constitution because it discriminated against interstate commerce in that it was a flat fee unrelated to mileage traveled in Washington and imposed a higher effective tax rate per mile on carriers traveling in interstate commerce than those solely in intrastate commerce. The complaint raised further claims related to federal preemption and 42 USC 1983. The complaint did not specifically mention the issue of internal consistency.

2. In the 1990 motion for preliminary injunction, Plaintiffs argued that to survive constitutional scrutiny, the fee must be in proportion to the taxpayer's level of activity in the

state. In supplemental briefing (See Clerk's Papers, Doc. 22), Plaintiffs also mentioned the internal consistency test, stating that flat taxes are inherently discriminatory because if each state imposed flat taxes, commerce among the states would be deterred. Scheiner was the main authority relied upon.

3. In the later 1990 motion for summary judgment, Plaintiffs raised both the internal consistency test and the fairly related test, citing *Scheiner.* (See Clerk's Papers, Doc. 47 and 70) Plaintiff cited examples applying the internal consistency test in *Goldberg v. Sweet,* 488 U.S. 252 (1988), where internal consistency was not a problem *and Container Corp. of America v. Franchise Tax Board,* 463 U.S. 169 (1983), where the court was concerned with the taxpayer's full business income only being taxed once. From these cases, Plaintiffs argued that the regulatory fee is not fairly apportioned in this case because all interstate carriers receive less than 100% of value for the fee paid, while really mixin intrastate carriers receive the fall 100% of value for the fee they pay the internal consistency discussion with the fairly related test. And, plaintiffs again argued the other theories of their case. (It is interesting to note that the State presented no discussion related to the internal consistency test, but focused entirely on discrimination and Plaintiffs' other arguments.) Plaintiff's reply (Clerk's Papers, Doc. 83) discussed the internal consistency test more fully, the fairly related test and the measure of the fee, and the discriminatory impact test, relying largely on *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), hereinafter referred to as *Complete Auto.* The State finally argued, as they have throughout, that the internal consistency test does not apply to regulatory fees, and, if it does, the administrative fee options cure the problem in this instance.

4. In Plaintiffs' 1996 second motion for summary judgment, the arguments remained the same, although discovery produced factual information requested by the court

on the discrimination claim. Plaintiffs argued both the internal consistency test and the factual discrimination issue.

5. Summary judgment was denied both parties in March 1991. Neither did anything to move this matter forward to an early trial. The legislature abolished the regulatory fee in 1993. Finally, in the summer of 1996, five years after the first summary judgment hearing, the parties brought this matter back for a second motion for summary judgment.

From this review, I conclude that the internal consistency argument was not part of the Plaintiffs' complaint, but by the time of the first summary judgment motion's hearing, the internal consistency argument was at issue.

I have reviewed the cases cited throughout these proceedings to determine whether the internal consistency test was available as guiding precedent at the outset of this case, independent of issues related to discrimination in fact.

The *Complete Auto* case, supra, (1977), had four prongs for analysis. To survive scrutiny under the Commerce Clause of the United States Constitution, the Court announced that a tax must:

1. Be applied to an activity with a substantial connection to the state;
2. Be fairly apportioned;
3. Not discriminate against interstate commerce; and
4. Be fairly related to the benefits provided the taxpayer by the state.

Although these four tests have been cited for over a decade for what the *Complete Auto* case stood for, there was little or no discussion of each test in the *Complete Auto* case itself. The commentary has come with the progeny.

Looking back at *Scheiner* which was decided in 1987, I now agree that the internal consistency test was discussed in that case separate and apart from the factual discrimination issues. However, it cannot be overlooked that there was factual discrimination in *Scheiner*. Interstate carriers based outside Pennsylvania paid more per mile for the privilege of traveling in Pennsylvania than intrastate carriers. And, the focus of the opinion in *Scheiner* was on the discrimination analysis. The fact that the *Scheiner* case included factual discrimination and internal consistency problems distinguishes it from the instant case. No discrimination in fact has been demonstrated here.

Plaintiffs consistently cited *Goldberg v. Sweet,* supra, (1988), which discussed the second prong of the *Complete Auto* test. There, it was again recognized that the central purpose behind the apportionment requirement is to ensure that each State taxes only its a fair share of an interstate transaction. *Goldberg, supra* at 261. "To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Goldberg, supra* at 26 1. The tax in *Goldberg was* only on interstate phone calls charged to an in-state service address for which there could be no multiple taxation if other states adopted an identical tax. "The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg, supra* at 262. The Court concluded that the risk of multiple taxation was low, actual multiple taxation was precluded by a credit provision, and there was no feasible alternative for apportionment. All of this analysis was independent of the discrimination analysis and fairly related prongs of the *Complete Auto* test which were also discussed. The case was not decided on the basis of the internal consistency test.

A new case that had been decided by the time of the second summary judgment motions was *Oklahoma Tax Commission v. Jefferson Lines,* 514 U.S. ---, 131 L.Ed.2d 261, 115 S.Ct. 1331 (1995), hereinafter referred to as *Jefferson Lines.* There, the United States Supreme Court clearly distinguished between the internal consistency test and the external consistency test as related to the fair apportionment prong of the *Complete Auto* test. The Court recognized that for a decade the fair apportionment issues had been assessed by asking whether the tax is internally consistent and externally consistent. The court stated:

"Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every other State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Jefferson Lines, supra* at 271.

"External consistency, on the other hand, looks not to the logical consequences of cloning, but to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activities within the taxing State." *Jefferson Lines, supra* at 272.

Jefferson Lines, supra, made clear that to pass the fair apportionment prong of the *Complete Auto* test, both the internal consistency and external consistency tests had to be met. The court considered fully the fair apportionment issue and found the tax fair because no identical tax could be imposed by other states.

By the time of the 1996 summary judgment motion, the fair, apportionment issues had been applied to user fee

analysis as well as excise tax analysis. The state court cases I relied on in particular for my October 1996 decision were *American Trucking Associations, Inc., v. Sec. of Administration,* 415 Mass. 337, 613 N.E. 95 (1993), involving a hazardous waste transporter fee, and *American Trucking Associations, Inc., v. State of Wisconsin*, 1996 WL 384533 (Wis.App. 1996), also involving a fee for hazardous waste transportation.

Although case law with respect to the internal consistency and external consistency principles of fair apportionment has not changed since the parties' initial hearings in 1990, none of the cases relied on in the 1990 hearings invalidated a tax or fee based on the internal consistency analysis alone. If *Scheiner's* application to his case had been clear, I can only believe Plaintiffs would have vigorously pushed this case to conclusion in this trial court and in the appellate forums. The delay suggests that the outcome may not have been clear to Plaintiffs, just as it was not clear to me. I do not find that the *Scheiner* decision clearly foreshadowed the result in this instance.

The next principle of the Chevron analysis is that of whether retroactive application furthers or retards the application of the court's ruling. Of course, I have declared unconstitutional, a statute that was repealed over three years ago. The issue was not moot because of the Plaintiffs' request for refunds. Retroactive relief, however, would not aid in the operation of the decision declaring the statute unconstitutional. The statute has not been in force, and the regulatory fee has not been collected, for three years.

Finally, the question is one of whether substantial inequitable results would follow from a retroactive application of the decision. Any regulatory fees collected by defendant have long ago been spent on the inspection program. Defendants collected the fees from 1990 to 1993 with the court's implicit approval (injunctive and summary judgment

relief had been denied). Plaintiffs do not claim to have paid inspection fees to other states (there were no other identical taxes). Plaintiffs have also not demonstrated that fees paid are, in fact, disproportionate to the benefit/burden of their presence in Washington or are discriminatory. (I earlier determined that mileage traveled has not been demonstrated be the measure of value of this regulatory program.) The regulatory fee was declared unconstitutional because of its potential burden on interstate commerce. No actual multiple burdens occurred. A nonretroactive application of the decision in this matter has not discriminated against Plaintiffs in interstate commerce and would avoid substantial hardship on the State.

Plaintiffs rely on *McKesson* Corp v. *Division ofAlcoholic Beverages and Tobacco,* 496 U.S. 18 (1990), to argue due process requires refunds. Defendant argues that the due process requirement of a pre-deprivation remedy announced in *McKesson* was available to Plaintiffs through administrative appeal or the courts. Plaintiffs in fact availed themselves of the injunctive relief process in this court. And, I agree with Defendant that the fact that the injunctive relief was denied does not negate the availability of a predeprivation process as required by due process. Finding due process requirements met, I have used the *Chevron Oil* test to analyze whether retroactive relief should be ordered.

The request for retroactive refund relief is denied.

Yours very truly,

/s/ PAUL CASEY

Paula Casey
Judge

PC:bvm
Court File

SUPERIOR COURT
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Letter Opinion

RE: *Frank & Sons, Inc., et al. v. WUTC, et al.*
Thurston County Cause No. 90-2-00495-1

Dear Counsel:

Both parties have again moved for summary judgement on the issue of the constitutionality of RCW 81.80.320. Since the initiation of this lawsuit and since the court's last ruling in the matter in 1991, RCW 81.80.320 has been repealed. The issues before the court are not moot, however, because Plaintiffs seek retroactive relief should the statute be declared unconstitutional.

I am satisfied that for RCW 81.80.320 to pass Commerce Clause constitutional scrutiny, the regulatory fee must not have be discriminatory with respect to interstate commerce, must have imposed no greater burden on Plaintiff's than was a fair approximation of the privilege granted (or the burden on

the state), and must not have the potential for multiple burdens on interstate carriers. The fee at issue here is based on gross weight of intrastate and interstate carriers, including those interstate carriers based in and out of Washington. Plaintiff's class is all interstate carriers traveling in Washington.

Discrimination. RCW 81.80.320 on its face does not discriminate between intrastate and interstate carriers. The regulatory fee is imposed on both. Plaintiffs' discrimination claim is based on their analysis that interstate carriers, generally, travel fewer miles per year in Washington than intrastate carriers and therefore pay more per mile for the safety inspection program than intrastate carriers. Plaintiffs further allege that the burden placed on Washington, out of which the safety inspection program arises, is directly related to miles traveled by each carrier.

Based on the Plaintiff's Affidavit of Robert Browning and Defendant's Second Affidavit of David Pollnow, there is a factual dispute about the actual differences in fee paid per mile traveled for interstate and intrastate carriers. More significant, however, is the parties' dispute as to whether mileage is a fair measure of the safety burden carriers place on Washington.

When this issue was presented to me in 1991, I did not decide it because of the absence of factual support for the proposition of whether interstate carriers were paying more per mile than intrastate carriers. However, I did assume, at page 4 of my March 4, 1991, letter decision, that a lesser presence in the state (fewer miles traveled) would be directly related to lesser burdens for safety regulation within the state. In American Trucking Ass'n v. Scheiner, 483 U.S. 266 (1987), miles traveled was a reasonable measure of the burdens for which the fee was intended to compensate (highway wear and tear). For purposes of a discrimination analysis, the regulatory fee must be considered in relation to

that which is a fair measure of the benefit conferred or burden borne.

After considering the materials for the renewed motions, I am not satisfied that mileage is a fair measure as Plaintiffs urge. Defendant's argument and supporting materials, including the Sixth Affidavit of Don Lewis, suggest that highway safety has unique burdens imposed by interstate carriers. Defendants claim that long distance carriers have more safety problems because they spend more time away from home base where maintenance of vehicles takes place, interstate carriers are generally larger than intrastate carriers and are more time consuming and difficult to inspect, interstate carrier drivers are more likely to exceed allowable driving hours than intrastate carrier drivers because of the nature of longer hauls, and interstate carriers are issued citations for safety violations much more often than intrastate carriers. These factual claims are not refuted by Plaintiffs.

Accordingly, I find Plaintiffs' concerns for the disparity of costs per mile to interstate and intrastate carriers does not mean that this regulatory fee discriminates against interstate commerce. There would have to be a relationship between miles and costs for the analysis to be meaningful. Plaintiff's have not proven such a relationship and have not proven discrimination in fact.

Internal Consistency. Of course, the Commerce Clause analysis does not end here. The next question is that of internal consistency. In my earlier decisions, I announced that the regulatory fees in this matter should not be distinguished from a tax for purposes of Commerce Clause analysis. The regulatory fee is exacted for the privilege of entering and using highways in Washington, much like the fees charged users for highway maintenance in American Trucking Assn., v. Scheiner, *supra*. It is still my opinion that the safety inspection program should not be analyzed differently because it arises from the state's police power rather than the state's

taxing authority. American Trucking Ass'n v. Secretary of Admin, 415 Mass 337, 613 N.E.2d. 95 (1993), specifically held that the internal consistency test applies to user fees for regulation of the transportation of hazardous materials. I agree with this state court ruling and its applicability to the regulatory fees in this case.

A regulatory fee must be reasonably related to a fair approximation of the benefit received or burden imposed and be such that if applied by every jurisdiction, there would be no interference with free trade. In this case, it is undisputed that the total of fees charged approximated the total cost incurred in administration of the safety inspection program. The fees authorized were based on gross weight of carriers and ranged from $7 to $48. The highest fee charged was $34. What is not answered is whether the cost of the safety program was reasonable in relation to the burden placed on interstate carriers who, with intrastate carriers, were required to pay for it.

Also, neither party's argument focuses on whether gross weight is an appropriate measure of differentiating charges among carriers, in order to fairly allocate benefits or burdens. Defendant's supporting materials show that larger carriers are generally found in interstate commerce where the greater safety regulation burden has been demonstrated. This alone is weak support for the idea that gross weight bears some relationship to the burden on the state from particular carriers regulated by the safety inspection program.

What is also apparent is that problems of highway safety requiring a safety inspection program in Washington are problems common to all states. All states could duplicate this fee on interstate carriers because the safety issues within their boundaries are similarly implicated. Accordingly, there is a potential for multiple burdens. The administrative alternatives do not save the regulatory fee. They simply vary the amount

of the fee with no more apparent direct proportional relationship to the burden than the basic annual fee itself.

Despite Commerce Clause implications, courts are allowed to examine whether a fee structure is the only alternative means of collecting for the burden on the state. Defendants in this case have not argued that there is no other alternative. Plaintiffs offer that the state has alternative taxing authority for interstate carriers in Washington as a source of revenue for highway programs, including safety.

Based on the foregoing discussion, I find that RCW 81.80.320 did not satisfy the internal consistency test of the Commerce Clause analysis. Therefore, the statute was unconstitutional.

Refund. Plaintiffs request retroactive application of this ruling. Having determined the statute unconstitutional and recognizing the significance of the large dollar amounts at stake for all parties, I would like to give counsel another opportunity to present arguments regarding the issue of refund. Please confer with each other and Judy Foster or Debbie Requa in the court's calendaring department to determine when further argument will be presented on the refund issue.

Very truly yours,

/s/ PAULA CASEY

Paula Casey
Judge

PC:bam

cc: Court File
Ms. Susan G. Loitz
Mr. Howard A. Coleman

SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

Building No. 2 Courthouse
Olympia, Washington 98502

2000 Lakeridge Drive S.W.
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March 8, 1991

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Re: FRANK & SONS, INC. ET AL., V. STATE OF WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, ET AL.,
Thurston County Cause No. 90-2-00495-1

Dear Counsel:

This case arises with Plaintiff's challenge to the annual regulatory fee imposed by RCW 81.80.320. Plaintiffs are interstate carriers that conduct business in Washington.

By previous oral ruling I declared that federal law does not also pre-empt the state's regulation and fee assessment. I also declared the state's argument distinguishing this fee from a tax fails under Commerce Clause analysis. I continue to hold those opinions and will not discuss them further here.

The remaining issue is whether Plaintiffs have proven that the regulatory fee, together with single trip permits available under RCW 81.80.318 and administrative options available

under WAC 480-112-130, exacted for the primary purpose of supporting a motor carrier safety inspection program violates the Commerce Clause of the United States Constitution. The regulatory fee is a lump sum annual fee based on gross weight of the vehicle.

American Trucking Association., Inc. v. *Scheiner*, 483 U.S. 266 (1987) is valuable precedent for this case. In *Scheiner*, the United States Supreme Court declared Pennsylvania's "flat" highway use taxes assessed against interstate carriers unconstitutional. A challenge had been brought to motor carrier fees assessed under two separate laws, In 1980 a $25 per vehicle marker fee was assessed against motor vehicle carriers except those registered in Pennsylvania. The Pennsylvania vehicles were subject to registration fees that the statute declared were deemed to include a marker fee. In 1982, Pennsylvania reduced its marker fee to $5 per vehicle, which the parties agreed was the cost of issuing the marker, and began assessing an annual axle tax of $36 per vehicle axle. Vehicles traveling less than 2,000 miles in Pennsylvania were entitled to a pro-rated rebate on the axle tax. Although the axle tax applied to in-state and out-of-state based vehicles, the registration fee paid by in-state vehicles was reduced by the same amount as the axle tax imposed.

Interstate motor carriers argued that both schemes imposed taxes only on carriers registered outside Pennsylvania.

The Supreme Court held that "[t]he way in which a tax levied on participants in interstate commerce in measured and assessed bears directly on whether it implicates central Commerce Clause values." *Id.* at 282. The Court stated that unapportioned flat taxes may disrupt free trade by putting pressure on businesses to ply their trade solely within the taxing state or suffer the penalty of possible cumulative taxes. "To pass the 'internal consistency' test, a state tax must be of

a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Id.* at 284. Pennsylvania's flat tax did not pass the internal consistency test because of the threat to free trade among the states.

Based on evidence presented, the Court also found Pennsylvania's flat tax subjected out-of-state vehicles to higher charges per mile than in-state vehicles and the charges did not fairly approximate the cost or value of using Pennsylvania roads. The tax therefore was not fairly related to the taxpayer's presence or activities within the state.

The Supreme Court did acknowledge that there are instances in which flat taxes would be constitutional, such as where there are no other practicable means of collecting revenues from users and a more finely graduated user fee would pose genuine administrative burdens. *Id.* at 296. This justification was not available to Pennsylvania because the state already used mileage based figures to apportion other fees for motor carriers.

When Plaintiffs in this case sought temporary relief, the state argued, and I agreed that those challenging the regulatory fee through commerce clause analysis have the burden of proving factual unfairness of the tax burden's affect on interstate commerce. Basically, Plaintiffs still have offered no admissible evidence on the issue. Nor has the state provided evidence to disprove Plaintiffs' promise. The state's evidence shows that the total amount of regulatory fees collected under the challenged provision reasonably approximates Washington's total cost of supervising and regulating motor carriers for safety purposes. What the evidence does not show is how the program or its charge relate to any carriers presence in the state.

One premise seems obvious, absent proof to the contrary: that vehicles travelling in interstate commerce necessarily do some of their business and travel outside the State of

Washington. Their lesser presence in the state seems logically and directly related to lesser burdens of the state for safety regulation. These assumptions, however, are not a sufficient basis for me to conclude whether the regulatory fee is fairly related to a carrier's presence in the state. Consequently, I deny both parties' notions for summary judgment and again request that discovery be continued so the court may be provided with a factual basis for its decision.

It may be argued by Plaintiffs that such factual support is not needed for the court's ruling on the question of internal consistency. The Washington fee challenged is a flat tax. If a similar fee were applied by every other state, only those carriers doing solely intrastate business would avoid cumulative tax burdens. Interstate business could be deterred or impeded by this consequence. The internal consistency test does not appear to be met by the challenged fee. However, it is my opinion that if there is fair apportionment of taxes based on the amount of contact with Washington, the internal consistency requirement may be satisfied.

Because it has been previously requested and not provided, wonder about the availability of statistical evidence. In its absence, it is important to know how the safety regulatory program works. What carriers are inspected where, with what frequency? Why is the particular scheme used? From this type of program operational information, it should be possible to determine whether the fee is fairly related to the taxpayer's presence in the state.

This matter should be met for trial unless the parties agree to present further factual information by affidavit.

Very truly yours,

/s/ PAULA CASEY
Paula Casey
Judge

IN THE
SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

FRANKS & SON, INC., AND COAST EXPRESS, INC., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,	)	
Plaintiffs,	)	
vs.	)	No. 90-2-00495-1
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; AND OFFICE OF THE STATE TREASURER,	)	REPORTER'S TRANSCRIPT
Defendants.	)	

VERBATIM REPORT OF PROCEEDINGS

BEFORE: THE HONORABLE PAULA CASEY, JUDGE

BE IT REMEMBERED that this matter came on regularly for ORAL OPINION OF THE COURT before the Court in the courtroom of the Thurston County Courthouse in Olympia, Washington, on July 6, 1990.

APPEARANCES

For the Plaintiffs: JAMES E. DAVENPORT
Attorney at Law
Riddell, Williams, Bullitt & Nalkinshaw
Suite 4400, 1001 Fourth Avenue Plaza
Seattle, Washington 98154

For the Defendants: JEFFREY D. GOLTZ
Assistant Attorney General
Utilities & Transportation Commission
1400 S. Evergreen Park Drive S.W.
Olympia, Washington 98504.

OLYMPIA, WASHINGTON, FRIDAY, JULY 6, 1990

MORNING SESSION

—00000—

THE COURT: Good morning. I'm sorry to have canceled our last meeting in this matter, but I'm glad you were able to come today.

This is the matter of Franks & Son v. State of Washington, Utilities and Transportation Commission. We are here for a ruling on the preliminary injunction issues that were argued about a month ago.

I notice that Mr. Goltz had some preliminary motions to strike supplemental briefing. I'm sure, Mr. Goltz, that you would like to address those. Technically, I will agree that the additional briefing was not actually authorized by the court or timely. Because my decision is not going to be predicated an the briefing, I don't think that the State has been prejudiced, and the briefs will remain in the court record.

MR. GOLTZ: Your Honor, then I'm not even going to address it. It's obviously not pivotal, and my reading of the

brief doesn't persuade me if it doesn't persuade you. I just wanted to basically send a signal to — not to Mr. Davenport — but to out-of-state counsel that, you know, I view that as inappropriate, and I just want to send a signal. And I hope in the future, as this litigation proceeds, we'll be able to reach a clear understanding, an arrangement for such briefs.

THE COURT: Anything else preliminary to the ruling that needs to be addressed?

I'll begin by saying that I have dealt with other taxing issues, as counsel is well aware, and taxing issues are often difficult and challenging ones. I find that the issue raised on this request for injunctive relief is a pretty close question. Counsel should recognize that and will recognize that by the nature of my ruling.

This matter, of course, comes before the court on the trucking company's motion. There has been a motion to certify a class that has been filed but it has not yet been argued, and the class has not yet been certified. Currently there are a couple of named trucking companies as plaintiffs that currently bring that action.

The present motion is for preliminary injunctive relief requiring the State to place proceeds from a regulatory fee collected pursuant to RCW 81.80.320 in escrow pending a decision on the merits of this action. Basically as you're well aware, the plaintiffs allege that the fee collected pursuant to that statute is an unconstitutional tax in violation of the Commerce Clause. The plaintiffs rely heavily on the Supreme Court's analysis of the *American States Trucking Association* v. *Scheiner* case and cases that have followed.

In resisting the plaintiff's constitutional challenge, the State has argued that this is a regulatory fee, not a tax, and that the State has authority to regulate for public safety. While I certainly agree that the State has authority to regulate for public safety, I believe that any regulation involving

imposition of a tax-like fee is subject to the same scrutiny under the Commerce Clause as taxes are. The regulatory scheme cannot burden interstate commerce more than Intrastate commerce.

The State also argues that this case is unlike the *Scheiner* case. In *Scheiner*, of course, taxes were collected for highway construction and repair, which is necessarily correlated with the number of miles traveled. The regulatory fees at issue here fund various programs, including a vehicle safety inspection program. Although these inspections and the safety issues may well be directly related to miles traveled, as in the *Scheiner* case, this correlation has not at this juncture been established by the evidence.

In fact, there is no evidence before the court as to what the correlation is between this inspection scheme and the tax collected. In fact, there is a lack of evidence explaining exactly how that safety inspection program works. There is no evidence to indicate whether the number of inspections are related to miles traveled. It is agreed that motor carrier checkpoints or weigh stations are located throughout the State, not simply at points of entry.

There is no evidence to indicate how the rate of inspection has been determined or its relationship to highway safety. There is no evidence on the question of whether the fees charged per vehicle are related to the cost of inspection per vehicle.

Now, if these issues are established In plaintiff's favor, and they very well may be when the evidence is examined, the State will still have an opportunity to show that this is the only practical means of collecting revenue to fund a safety program. If we get that far, it seems very possible and likely that the State will be unable to meet the burden of justifying a flat tax.

But again, I think that the plaintiff does have the burden to go forth in producing evidence to show the discriminatory nature of the tax. The State does have the opportunity to attempt to justify the flat tax and, without that evidence, the court cannot determine that the plaintiffs are likely to prevail on the merits.

The posture of the case today precludes pre-judgment of these issues in the absence of specific evidence on how the regulatory system works. As I read the *Scheiner* case, flat taxes or fees are rarely appropriate, but the plaintiff must be put to its burden of proof before this scheme can actually be declared to be unconstitutional.

Also, because the escrowing of proceeds from this tax would have significant impact on the safety inspection program, I think that the court needs to proceed with some caution. I believe that caution dictates denying the plaintiff's request for injunctive relief on constitutional grounds at this time.

In addition to the constitutional argument, the plaintiffs have argued that federal preemption limits the State's authority to collect more than $10 per vehicle, which is the federal limit authorized for carrier identification stamps.

I am not convinced that Congress has preempted the State's authority to charge a regulatory fee for its safety program and assessing it at the time of registration. In appears that the ICC regulations promulgated pursuant to federal law actually declares that states may impose additional fees for other purposes, other than the simple posting of the identification stamps within vehicles. It is my belief that the plaintiffs are not likely to prevail on the federal preemption issue.

Again, although I am denying the plaintiffs their injunctive relief today, it seems likely that the plaintiffs may ultimately prevail on this issue once the evidence is presented,

since flat taxes are appropriate only in rare instances. Certainly I would recommend that discovery proceed and that the parties address resolution of this issue and the State address whether this policy is the most appropriate policy for funding its inspection program.

It's my understanding that unless they bring more vehicles into the state, the plaintiffs will not actually be faced with paying for more fees related to this inspection process until next January. It is also my understanding that we currently have trial dates available before next January. It seems to me that the best solution to this current problem, to avoid payment of taxes that are questionably refundable if this law is ultimately declared to be unconstitutional, is to have the trial as early as possible.

Now, I don't know if counsel are aware, but the court has recently adopted a new process for trial settings which requires filing a certificate of readiness after the completion of discovery. Under the new rule, a trial date is not assigned until that certificate of readiness is filed. But because of the importance, in my opinion, of resolving these constitutional issues before significantly more taxes are collected, I am going to authorize the waiver of the certificate of readiness procedure in this case and allow a trial date to be assigned as soon as an answer is filed.

I'm not sure if there is an answer in the file at this time?

MR. GOLTZ: There is not, Your Honor.

THE COURT: Because I know that the plaintiffs also are eager to proceed. I'm sure an answer is due by now; is that right?

MR. GOLTZ: It's overdue by a few days.

THE COURT: I'm going to require that the answer actually be filed by next Friday so that the parties can proceed to obtain a trial date.

MR. GOLTZ: That's fine, Your Honor.

MR. DAVENPORT: Your Honor, the plaintiffs have filed a motion to determine the propriety of the class action, and I'd like Your Honor's advice or counsel about how you would prefer us to proceed on that. May we note that matter back before Your Honor, or should we take that back on the motion calendar; and given the trial matter that you've brought up, what timing would you like us to have that matter considered?

THE COURT: This is a case that I think should be pre-assigned, and I'm actually going to suggest to the Calendar Administrator that this case be pre-assigned to me because of the time that I have spent just dealing with the *Scheiner* analysis.

With respect to the motion for class certification, that can be rescheduled in front of me at any time at an 8:45 hearing, but I'm wondering if there's actually going to be opposition to the class certification.

MR. GOLTZ: As the motion stands, there will be, Your Honor. As a matter of fact, on Monday we will be sending out some — I hope on Monday — some limited discovery which will include in that some issues relevant to the class certification. And so as soon as the responses to those particular questions are received, then it can be — we can file our responsive brief and it can be argued, as far as I'm concerned.

MR. DAVENPORT: We'd just like to have it considered as soon as possible, giving the State the opportunity to respond in an appropriate way.

MR. GOLTZ: Would it be useful for us to check with Ms. Foster about an 8:45 date?

THE COURT: Sure, she's the one that actually schedules the dates at your convenience. While you're both here today, I would suggest you speak with her about potential trial dates.

(Discussion off the record.)

MR. DAVENPORT: If I may, for a point of clarification, is your ruling here today based on a finding that the plaintiffs are likely to prevail on the matter of the flat tax violating the Commerce Clause, or that they are not likely to prevail?

THE COURT: Today I cannot find that plaintiffs are likely to prevail because I don't have the evidence from which to conclude that they are. It is my belief that the plaintiffs may well be able to produce evidence to prevail, but the evidence as to how this inspection fee and the inspection system work relative to interstate and intrastate carriers is simply not in the record.

If I would find there is a likelihood of prevailing to the merits, of course, I would grant the injunction. Based on the evidence we have today, there's a lack of evidence for reaching that-conclusion.

MR. DAVENPORT: Then as to the federal preemption issue, you've also found that it is not likely that they will prevail — the plaintiffs will prevail; is that correct?

THE COURT: Definitely. That is not due to an evidentiary problem, but my belief and finding that the federal law does not preempt the state's imposition of inspection fees in addition to the identification fee at the time of registration.

MR. GOLTZ: We'll prepare an order.

THE COURT: Okay.

MR. DAVENPORT: Thank you, Your Honor.

MR. GOLTZ: Thank you, Your Honor.

(Proceedings concluded.)

IN THE
SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

FRANKS & SON, INC., and COAST EXPRESS, INC.,	)	
Plaintiffs,	)	NO. 90-2-00495-1
vs.	)	ORDER DENYING MOTION OF PLAINTIFF CARRIERS FOR PRELIMINARY INJUNCTION ESCROWING REGULATORY FEE PROCEEDS
STATE OF WASHINGTON; WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; AND OFFICE OF THE STATE TREASURE,	)	
Defendants.	)	

This matter came before the Court upon the motion of plaintiffs, Franks & Son, Inc., and Coast Express, Inc., for a preliminary injunction seeking an order requiring the state defendants to place in escrow all unexpended regulatory fees paid pursuant to RCW 81.80.320 pending the outcome of this litigation. After considering the briefs and records in this case, having heard oral argument on June 7, 1990, having received and reviewed supplemental memoranda, and having rendered an oral opinion on July 6, 1990, the Court makes Findings of Fact and Conclusions of Law as set forth in the Court's Oral Opinion, a copy of which is attached hereto.

Based on those Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED: KENNETH O. EIKENBERRY.
ATTORNEY GENERAL

_____
Assistant Attorney General

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Drive SW
Mail Stop: FY-11
Olympia. Wa. (206)
98504 Telephone

Order Denying Mot.
for Prelim. Injunction

1. Plaintiffs' Motion for a Preliminary Injunction Requiring the Escrowing of Regulatory Fee Proceeds is denied.

2. State Defendants' Motion to Strike the Plaintiffs Reply to the State's Supplemental Memorandum is denied.

3. The parties may seek and obtain a trial date from the calendar administrator without the filing of a certificate of readiness as required by local rules.

4. This case is assigned to the undersigned Judge.

DATED this [27th] day of September, 1990.

/s/ PAULA CASEY
JUDGE

Presented by:

KENNETH O. EIKENBERRY

/s/ JEFFREY D. GOLTZ
JEFFREY D. GOLTZ
Assistant Attorney General
Attorney for State Defendants

Copy received; Notice of
presentation waived:

/s/ JAMES H. DAVENPORT
JAMES H. DAVENPORT
Attorney for Plaintiffs